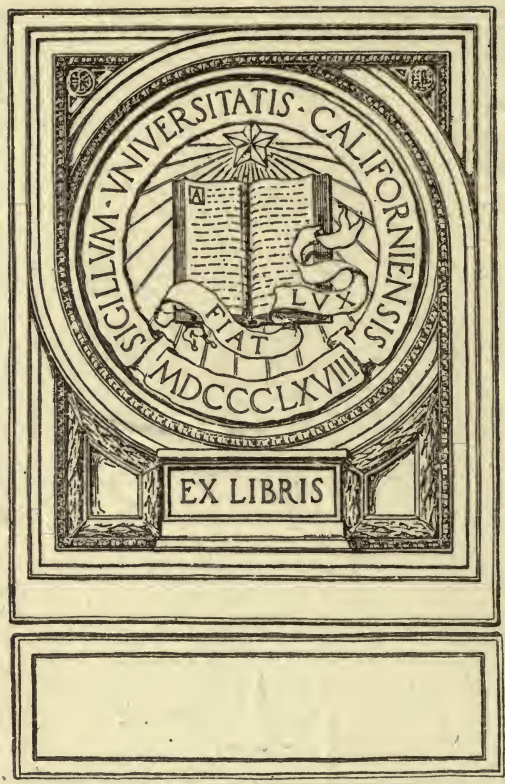
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A

SYSTEM

OF THE LAW OF

MARINE INSURANCES.

VOL. II.

A

SYSTEM

OF THE LAW OF

MARINE INSURANCES.

WITH THREE CHAPTERS,

ON BOTTOMRY,

ON INSURANCES ON LIVES,

ON INSURANCES AGAINST FIRE.

BY JAMES ALLAN PARK, Esq.

ONE OF HIS MAJESTY'S COUNSEL.

Lex (de quâ agimus) *est fons æquitatis.* CICERO.

THE SIXTH EDITION,

WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.

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CHAPTER THE FOURTEENTH.

Of Wager-Policies.

CHAP. XIV.

HAVING in the four preceding chapters ſtated the various caſes, in which the contract of inſurance is void from its very commencement, on account of its repugnancy to thoſe principles of juſtice, equity, and good faith, which are the great foundation of all contracts between man and man; we proceed to treat of thoſe policies, which by the poſitive ſtatute law of the country are declared to be abſolutely null and void. Of theſe the largeſt claſs are wager-policies, or policies as they are called, upon intereſt or no intereſt.

The nature of the contract of inſurance, in its original ſtate, was, that a ſpecifick voyage ſhould be performed free from perils; and in caſe of accidents, during ſuch voyage, the inſurer, in conſideration of the premium he received, was to bear the merchant harmleſs. It followed from thence, that the contract related to the ſafety of the voyage thus particularly deſcribed, in reſpect either of ſhip or cargo: and that the perſon inſured could not recover beyond the amount of his real loſs.

In proceſs of time, however, variations were made, by expreſs agreement, from the firſt kind of policy; and in caſes where the trader did not think it proper to diſcloſe the nature of his intereſt, the inſurer diſpenſed with the inſured having any intereſt either in the ſhip or cargo. In this laſt kind of policy (of which we are now to treat) "valued free from average," and "inte-"reſt or no intereſt," it is manifeſt, that the performance of the voyage or adventure, in a reaſonable time and manner, and not the bare exiſtence of the ſhip or cargo, is the object of the inſurance.

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Such an object as that, from a reference to the real nature of an insurance, as stated in the outset of the chapter, namely, that it is a contract of indemnity from a real and manifest, not from a supposed and ideal loss, must have been originally bad. Indeed it has been declared from the bench, prior to the discussion of *Assievedo* v. *Cambridge*, in the reign of queen *Anne*, that such insurances were *formerly* bad; for it is taken for granted in 1692 to be settled law, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject matter, should profit by them.

Assievedo v. Cambridge, 10 Mod. 77. Goddard v. Garrett, 2 Vern. 269.

The idea thus started seems to receive some confirmation from the counsel, and was not contradicted by the Court in the case of *Depaiba* v. *Ludlow*, for the counsel there observed, that insurances upon interest or no interest were introduced *since* the revolution.

Depaiba v. Ludlow, Comyn's Rep. 360.

If this was the law of *England* in this respect, previous to the revolution, as these cases suppose it to be, it was consonant to the positive laws of most of the commercial states and countries in *Europe*. For we find that by positive regulations of *Middlebourg*, *Genoa*, *Konyngsburg*, *Rotterdam*, and *Stockholm*, all insurances upon wagers, or as interest or no interest, are declared to be absolutely void, and of no effect.

2 Mag. 70. 65. 88. 189. 257.

But though this mode of insuring gained footing in *England*, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determinations shewed the strong prejudices which they entertained against them. The courts of Equity in particular manifed that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void. This is evident from two cases in *Vernon*'s Reports.

In one of them, the defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.* and he insured 450*l.* on the ship; the plaintiff's bill was

Goddart v. Garrett, 2 Vern. 269. Trin. Term. 1692.

was to have the policy delivered up, becauſe the defendant was not concerned in point of intereſt as to the ſhip or cargo.

Per curiam. Take it that the law is ſettled, that if a man has no intereſt, and inſures, the inſurance is void, though it be expreſſed in the policy, *intereſted or not intereſted.* The reaſon the law goes upon is, that inſurances were made for the benefit of trade, and not that perſons unconcerned therein, and who were not intereſted in the ſhip, ſhould profit thereby; and *where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.* And the reaſon why the law allows that a man having ſome intereſt in the ſhip or cargo may inſure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readineſs to lade on board his ſhip. *Per Cur.* Decree the policy to be delivered up to be cancelled.

From the ſpirit of this deciſion it may likewiſe appear, that the Court of Chancery inclined to think, that an inſurance made without the benefit of ſalvage to the inſurer, was unconſcientious, and a proper ſubject for relief in equity; for the Court expreſsly ſays, where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.

In another caſe alſo, which was on a policy of inſurance on goods, by agreement valued at 600*l.* and the inſured not to be obliged to prove any intereſt: the Lord Chancellor ordered the defendant to diſcover what goods he put on board; for although the defendant offered to renounce all intereſt to the inſurers, yet it muſt be referred to the Maſter to examine the value of the goods ſaved, and to deduct it out of the value or ſum of 600*l.* at which the goods were valued by the agreement.

Le Pypre v. Fair, 2 Vern. 716. In Chancery, Michaelmas. Term, 1716.

There was one very remarkable difference between policies upon intereſt, and ſuch as were not, of which I believe notice has already been taken in a former part of this work: namely, that in policies upon intereſt, you recover for the loſs actually ſuſtained, whether it be total or partial: but upon a wager-policy, you can never recover but for a total loſs. All the doctrine, which turns upon this diſtinction between intereſt and wager-policies was conſidered at much length by Lord *Mansfield* in the famous

2 Burr. 683; Vide ante, p. 197.

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famous cauſe of *Goſs* v. *Withers*, to which we have had occaſion more than once to refer.

Vide ante, c. 1.

It has already been obſerved, that the ſecurity given to the inſured was very conſiderably increaſed by the erection of two Aſſurance Companies, which were incorporated by royal charter in the year 1720; for the legiſlature had taken care that thoſe corporations ſhould have ſufficient funds to anſwer any demands that might be made upon them, in the common courſe of buſineſs. But this additional ſecurity for the inſured ſoon produced many dangerous and alarming conſequences, which, if they had not been checked, would have proved very detrimental to the trade of this country. For inſtead of confining the buſineſs of inſurances to real riſks, and conſidering them merely as an indemnity to the fair dealer againſt any loſs which he might ſuſtain in the courſe of a trading voyage, which, as we have ſeen, was the original deſign of them; that practice, which only prevailed ſince the revolution, of inſuring ideal riſks, under the names of *intereſt or no intereſt*, *or without further proof of intereſt than the policy*, *or without benefit of ſalvage to the underwriters*, was encreaſing to an alarming degree, and by ſuch rapid ſtrides as to threaten the ſpeedy annihilation of that lucrative and moſt beneficial branch of trade. All theſe various kinds of inſurance juſt enumerated (and many others, which the ingenuity of bad men found no difficulty in deviſing), having no reference whatever to actual trade or commerce, were very juſtly conſidered as mere gaming or wager-policies: and therefore the legiſlature thought it neceſſary to give them an effectual check, and, by poſitive rules, to fix and aſcertain what property or intereſt a merchant ſhould be permitted to inſure.

Accordingly an act of parliament, paſſed in the 19th year of the reign of king *George* the Second, intituled, "an act to regulate "inſurance on ſhips belonging to the ſubjects of *Great Britain*, "and on merchandizes or effects laden thereon." As this act is the moſt important and moſt extenſive in the whole code of ſtatute law, with regard to inſurance, I ſhall now cite as much of it at length as relates to the preſent chapter, and afterwards the other clauſes of it under thoſe heads, to which they more immediately apply.

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The causes which co-operated to induce the legislative body to pass such an act, are fully stated in the preamble. "Whereas "it hath been found by experience, that the making assurances "interest or no interest, or without further proof of interest "than the policy, hath been productive of many pernicious "practices, whereby great numbers of ships, with their car- "goes, have either been fraudulently lost and destroyed, or ta- "ken by the enemy in time of war; and such assurances have "encouraged the exportation of wool, and the carrying on "many other prohibited and clandestine trades, which by means "of such assurances have been concealed, and the parties con- "cerned secured from loss, as well to the diminution of the "publick revenue, as to the great detriment of fair traders; "and by introducing a mischievous kind of gaming or wagering, "under the pretence of assuring the risk on shipping, and fair "trade, the institution and laudable design of making assurances "hath been perverted; and that, which was intended for the "encouragement of trade and navigation, has, in many in- "stances, become hurtful of, and destructive to the same."

19 Geo. II. c. 37.

"For remedy whereof be it enacted, that no assurance or as- "surances shall be made by any person or persons, bodies cor- "porate or politick, on any ship or ships belonging to his ma- "jesty, or any of his subjects, or on any goods, merchandizes, "or effects, laden or to be laden on board of any such ship or "ships, *interest or no interest, or without further proof of interest "than the policy, or by way of gaming, or wagering, or without "benefit of salvage to the assurer*; and that every such insurance "shall be null and void to all intents and purposes."

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"Provided always, that assurance on private ships of war, "fitted out by any of his majesty's subjects solely to cruize "against his majesty's enemies, may be made by or for the "owners thereof, interest or no interest, free of average, and "without benefit of salvage to the assurer; any thing herein "contained to the contrary thereof in any wise notwithstand- "ing."

Sect. 2.

"Provided also, that any merchandizes or effects from any "ports or places in *Europe* or *America*, in the possession of the

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" crowns of *Spain* or *Portugal*, may be assured in such way and " manner, as if this act had not been made."

Sect. 4. The fourth section relates to re-insurances, which will be the subject of the following chapter.

Sect. 5. " And be it enacted, that all and every sum and sums of mo- " ney to be lent on bottomry, or at *respondentia*, upon any ship " or ships belonging to any of his majesty's subjects, bound to " or from the *East Indies*, shall be lent only on the ship, or on " the merchandize or effects laden, or to be laden, on board of " such ship, and shall be so expressed in the condition of the " said bond: and the benefit of salvage shall be allowed to the " lender, his agents or assigns, *who alone shall have a right to* " *make assurance on the money so lent:* and no borrower of money " on bottomry or *respondentia*, as aforesaid, shall recover more " on any insurance than the value of his interest in the ship, or " in the merchandizes or effects laden on board of such ship, " exclusive of the money so borrowed; and in case it shall ap- " pear, that the value of his share in the ship, or in the mer- " chandizes or effects laden on board, doth not amount to the " full sum or sums he had borrowed as aforesaid, such borrower " shall be responsible to the lender for so much of the money " borrowed, as he hath not laid out on the ship or merchandize " laden thereon, with lawful interest for the same, together with " the assurance, and all other charges thereon, in the proportion " the money not laid out shall bear to the whole money lent, " notwithstanding the ship and merchandizes be totally lost-"

Upon this last section, of which we shall treat more fully in the chapter on Bottomry, it may be sufficient in this place to observe, that none but the lender shall have a right to make insurance on the money lent. It is also to be remarked, that this regulation of insurance on bottomry or *respondentia* interest, extends only to *East India* ships: and therefore, an insurance of a *respondentia* interest upon any other ships may be made in the same manner as they used to be before this act. It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances: and it was declared by the whole court in the case of *Glover* v. *Black*, which

which was fully reported in a former chapter, to be the eſtabliſhed law and uſage of merchants, that *reſpondentia* and bottomry muſt be mentioned and ſpecified in the policy of inſurance.

Glover v. Black. 3 Burr. 1394. Vide ante, c. 1. p. 12.

By the firſt ſection of the act it is clear that at this day all inſurances made contrary to it are abſolutely void and of no effect: which, as has already been ſhewn, was alſo the caſe by the ancient law of this country. It may now be material to conſider firſt, what caſes have, by the conſtruction put by the learned judges upon this ſtatute, been held not to fall within its deſcription: and ſecondly, thoſe which do, and in which, the policies have conſequently been holden to be void.

It was formerly a matter of doubt, whether the act was meant to extend to inſurances of foreign property, and on foreign ſhips. The better opinion, however, was, that it did not; for it was clear, that ſuch inſurances did not fall within the words of the ſtatute; and from an attentive conſideration of the preamble, they do not ſeem to come under the deſcription of the miſchiefs, againſt which it was the intention of the legiſlature to provide. But theſe doubts are entirely at an end by ſeveral deciſions of the courts; and particularly by a caſe, in which it was expreſsly declared by the court (and the reaſon for it ſtated), that the act was not deſigned to extend to foreign ſhips.

Thelluſſon v. Fletcher. Dougl. 315.

The caſe was this: the policy was on goods, on board three *French* veſſels, from *St. Domingo* to *Bourdeaux*. The material part of it, as to this caſe, was in the following words: "On "all goods loaden or to be loaden on board the ſhips *Le Soigneux*, "*La Pucelle*, *Le Vainquer*, all or any of them. The ſaid goods, "and merchandizes by agreement are, and ſhall be valued at "(*a*) on 25 caſks of clayed ſugar, and 12 "hogſheads of muſcavadoes: *the policy to be deemed ſufficient proof* "*of intereſt, in caſe of loſs.*" The firſt count in the declaration ſtated, that goods to a great amount, being the property of certain foreigners, had been ſhipped on board *Le Soigneux*, and that ſhe had been loſt. The ſecond averred, that the goods were ſhipped on board *the three ſhips, or ſome or one of them*, to the

(*a*) This was blank, as here printed.

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amount of the ſum inſured; and that two of them had been captured, and the other loſt.

This caſe came before the court upon a motion to ſet aſide the writ of enquiry, which had been executed before the ſheriff, after a judgment by default, on this ground: that the jury had aſſeſſed the damages to the amount of the defendant's ſubſcription, without any proof of the amount or value or any evidence whatever, except that of the defendant's handwriting to the policy. In addition to this objection, an affidavit was produced, tending to ſhew, that in fact the inſured had no intereſt. It was argued for the defendant, that by the expreſs agreement of the parties, no other proof of intereſt but the policy was required; and this inſurance on foreign ſhips and property was not within the ſtatute prohibiting ſuch policies; ſo that the plaintiff was entitled to recover the ſum inſured by the defendant, even if it could be proved that the inſured had no property on board. The court ſaid that this was not a policy within the ſtatute, foreign ſhips not having been included in that act, on account of the difficulty of bringing witneſſes from abroad to prove the intereſt. The only difficulty there could have been here, was from the circumſtance of there having been three ſhips; but the ſecond count was ſo framed, as to make the caſe the ſame, as if there had been but one. By ſuffering judgment to go by default, the defendant has confeſſed the plaintiff's title to recover; and the amount was fixed by the ſtipulation in the policy.

Crauford v. Hunter, 8 Term Rep. 13. See the ſame caſe, poſt 360. Crauford v. Lucena, S. P. See 35 Geo. III. c. 80.

In a ſtill more modern caſe, which was much diſcuſſed in two arguments, one of the points was, the inſurance being on *Dutch* prize ſhips, whether a count in the declaration, averring that the plaintiffs as commiſſioners for the diſpoſal of *Dutch* ſhips and effects made the inſurance, *and that the ſaid ſhips, or any of them, were not belonging to his majeſty, or any of his ſubjects,* was good. This point came on upon a demurrer: and after argument,

Lord *Kenyon* ſaid—"This queſtion depends on the conſtruction of the ſtatute 19 *Geo.* 2. *c.* 37. for notwithſtanding the argument, I think at common law a perſon might inſure without having any intereſt; but the preamble and enacting part of the ſtatute

ſtatute remove all doubt; for the act recites the miſchiefs and inconveniences that had ariſen from the making of aſſurances intereſt or no intereſt, and then it enacts (not declaring) that no ſuch aſſurance ſhall be made, except in certain caſes, which for very wiſe and politic reaſons were excepted. Therefore I am ſatisfied that this count is good, unleſs it be on an inſurance prohibited by that ſtatute. But that ſtatute only applies to ſhips belonging to his majeſty or any of his ſubjects, and does not extend to foreign ſhips. The defendant's counſel then wiſhed us to conſider theſe ſhips as belonging to the government of this country: but that cannot be, for the property in captured ſhips is not altered before condemnation in the court of Admiralty.

It was formerly thought, that a *valued* policy was a wager-policy, like intereſt or no intereſt. But this idea is now exploded, as we ſhall preſently ſhew by a ſolemn deciſion of the court of King's Bench. Of the difference between open and valued policies much has been already ſaid; and the origin of the latter was derived from this ſource, it being ſometimes troubleſome to the trader to prove the value of his intereſt, or to aſcertain the quantity of his loſs, he gave the inſurer a higher premium to agree to eſtimate his intereſt at a preciſe ſum. To recover upon this kind of policy, the inſured need only prove that he had an intereſt, without ſhewing the value. If indeed it appeared, or could be made appear, that the intereſt proved was merely a cover to a wager, in order to evade the ſtatute, there is no doubt ſuch a policy would be void.

Vide ante, c. 1.

All this doctrine was very fully ſtated, and commented upon by Lord *Mansfield*, in giving judgment in a cauſe then depending in the court of King's Bench. "A valued policy," ſaid his Lordſhip, "is not to be conſidered as a wager-policy, or like "*intereſt or no intereſt*. If it were, it would be void by the act "of 19 *Geo.* 2. *c.* 37. The only effect of the valuation is fixing "the amount of the prime coſt; juſt as if the parties had admitted it at the trial: but in every argument, and for every "other purpoſe, it muſt be taken that the value was fixed *in* "*ſuch a manner*, as that the inſured meant only to have an indemnity. If it be undervalued, the merchant himſelf ſtands "inſurer for the ſurplus. If it be *much overvalued*, it muſt be "done

Lewis v. Rucker, 2 Burr. 1167. Vide ante, c. 6. p. 132.

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" done with a bad view; either to gain, contrary to the 19th of " the late king; or with ſome view to a fraudulent loſs: there- " fore an inſured never can be allowed to plead in a court of " juſtice, that he has greatly overvalued, or that his intereſt " was a trifle only. It is ſettled, that upon valued policies the " merchant need only prove ſome intereſt, to take it out of " 19 *Geo.* 2. becauſe the adverſe party has admitted the value: " and if more were required, the agreed valuation would ſignify " nothing. But if it ſhould come out in proof, that a man had " inſured 2000*l.* and had intereſt on board to the value of a " cable only; there never has been, and I believe there never " will be a determination, that by ſuch an evaſion the act of " parliament may be defeated. There are many conveniences " from allowing valued policies: but where they are uſed merely " as a cover to a wager, they would be conſidered as an evaſion. " The effect of the valuation is only fixing concluſively the prime " coſt. If it be an open policy, the prime coſt muſt be proved: " in a valued policy it is agreed." For theſe reaſons Lord *Mansfield* held, that a valued policy is not void by the ſtatute of the 19 *Geo.* 2.

The paſſage juſt quoted at length was, in a ſubſequent caſe, referred to in the judgment of the court; and the doctrine there advanced was adopted and confirmed.

Grant v. Parkinſon Mich. 21 Geo. III. in B. R.

It was an action on a policy of inſurance on the ſhip *Providence* at and from *Surinam*, or whatſoever other ports in the *Weſt Indies* at which the ſhip might load, to *Quebec*. At the trial before Lord *Mansfield*, at the ſittings after *Trinity* Term 1781, the principal queſtion on the merits was, whether the plaintiff had an inſurable intereſt. It was an inſurance on the profits expected to ariſe on a cargo of molaſſes belonging to the plaintiff, who had a contract with government to ſupply the army with ſpruce beer. Lord *Mansfield* thought it an inſurable intereſt. But the part of the caſe, which calls for our attention at preſent, was a clauſe declaring, " that in caſe of loſs, it was " agreed that the profits ſhould be valued at 1000*l.* without any " other voucher than the policy." This, it was inſiſted, rendered the policy void, as well within the letter, as within the ſpirit of the 19 *Geo.* 2. *c.* 37.

Lord

Lord *Mansfield*, at the trial, inclined to think that the contract was a fair one; but ſtill he could not get over the objection, the inſtrument being void on the face of it. His Lordſhip, however, ſaved the point for the opinion of the court, a verdict being entered for the plaintiff, ſubject to that reference.

In *Michaelmas* Term following, the matter came on to be heard; when after full argument at the bar,

Lord *Mansfield*, C. J. ſaid: "I have, ſince the ſittings at "*Guildhall*, on further conſideration, changed my opinion. I "then thought the preſent policy within the act of parliament: "I now think otherwiſe. On the conſtruction of the act, it has "uniformly been held, that a valued policy is not void. It is "incumbent on the plaintiff to prove ſome intereſt; but it is not "neceſſary to go into the whole value. In the caſe of *Lewis* v. "*Rucker*, this doctrine was much conſidered."—[Here his Lordſhip read the words already reported, and then he proceeds thus] "This inſurance is on the profits of a cargo, belonging "to a man, having a contract to ſupply the army, and if it ar- "rive, the profits are pretty certain. The meaning of the po- "licy is not to evade the act of parliament, but to avoid the "difficulty of going into an exact account of the quantum. I "cannot diſtinguiſh it from a valued policy; there is no pre- "tence for ſaying it is a *wagering* one." The other judges concurred; and the *poſtea* was given to the plaintiff.

In a caſe before the late Lord *Kenyon*, where the intereſt was ſtated in the policy to be "on the commiſſions of the plaintiff as conſignee of the cargo, valued at 1500*l.*, his lordſhip expreſſed a ſtrong opinion, that this was a good inſurable intereſt; but the matter being compromiſed, it did not come to any deciſion. Since that time, however, the queſtion was brought in a more ſolemn manner for the opinion of the court upon a caſe reſerved. The policy ſtated the inſurance to be *on profits valued at* 2000*l.* The declaration averred, and the fact was, that the *inſured was intereſted in the profits to ariſe, and be made, from the ſale and diſpoſal of the ſaid cargo of goods.* This caſe was twice argued at the bar, once in the time of Lord *Kenyon*, and after time taken to deliberate, the judgment of Mr. Juſtice *Groſe*,

Flint v. Le. Meſurier. Sittings after Hil. Term 1796, at Guildhall.

Barclay v. Couſins, 2 Eaſt's R. 544.

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Mr. Juſtice *Le Blanc* and himſelf, was delivered in a very luminous and perſpicuous manner by Mr. Juſtice *Lawrence*, who declared, in the cloſe of it, that Lord *Kenyon* concurred in the judgment ſo pronounced. The deciſion was, that ſuch profits were the ſubject of inſurance, and the caſe is argued by his lordſhip upon general principles of commercial ſpeculation; upon the opinions of foreign juriſts, and upon the caſes of *Grant* v. *Parkinſon* above ſtated, and another, prior in point of time to it, namely, *Henrickſon* v. *Margetſon*, in *Michaelmas* Term 1776. But in ſuch a caſe it is neceſſary to ſhew ſatisfactorily that the loſs of profits aroſe from a peril inſured againſt, ſuch as perils of the ſea, &c., not from the ſtate of the market, for which the underwriters are not reſponſible. In ſhort, it is incumbent on the aſſured to ſhew, as was obſerved by Mr. Juſtice *Lawrence*, in the caſe now referred to, that if there had been no ſhipwreck, there would have been ſome profit.

2 East's R. 549. note (*a*).

Hodgſon v. Glover. 6 East. 316.

King v. Glover, 2 New R. 206.

So alſo in the Common Pleas, after much deliberation, all the Judges of that court were of opinion that an *African* captain, who, beſides his wages, was entitled for his trouble and attention in purchaſing ſlaves on the coaſt of *Africa*, and ſelling and diſpoſing of them in the *Weſt Indies*, to ſo much *per cent.*, and other privileges, had a good inſurable intereſt in this remuneration.

In all the caſes above quoted, there was ſomething of certainty in the profits or commiſſions which the aſſured expected; and it appeared in them that by a peril inſured he was prevented from enjoying the profit. But where not only the profits are an expectation, but the obtaining a cargo, out of which the commiſſion is to ariſe, is alſo an expectation, ſuch an inſurance cannot be ſupported without entirely deſtroying the intention of the ſtat. 19. *Geo.* 2. ch. 37. The caſe in which the conſideration, which I have juſt mentioned, occurred, was, in an aſſurance "on the ſhip *Friendſhip*, at and from *Briſtol* to *St. Thomas's* "and *Jamaica*, and from thence back to *Dublin*, on commiſ- "ſions valued at 1000*l.*" The admitted facts were, that the plaintiff and one *Alexander Robe*, of *Briſtol*, merchant, on the 26th *March*, 1807, entered into a charter-party for the voyage in queſtion: that the ſhip *Friendſhip* ſailed from *Briſtol* with a cargo

Knox v. Wood, Mich. Sittings at Guildhall, 1808.

cargo for *St. Thomas's, but which cargo was not the property of the plaintiff, nor insured by this policy:* that the ship delivered her cargo at *St. Thomas's*, and proceeded from thence in ballast for *Jamaica*, and was captured before her arrival, and carried into *Cuba*, where she was ransomed by the captain, and again proceeded for, *and arrived at* Jamaica: *that the policy in question was meant and intended by the plaintiff as an insurance upon the commissions expected to arise upon the sale and disposition by the plaintiff in* Dublin *of produce expected to be shipped on board the said ship at* Jamaica. When the counsel for the plaintiff had opened this case, Lord *Ellenborough* said, it is agreed, that this insurance was on the commissions on the homeward cargo; and it is also agreed, that the vessel arrived at the place where that homeward cargo was to be shipped, and no reason is assigned why it was not shipped. No cargo appears to have been ready; this is an insurance of an expectation of an expectation. If courts of justice were to give effect to insurances of this description, they had at once better repeal the statute against wager policies. The plaintiff was nonsuited.

In the following term a motion was made to set aside this nonsuit, which was refused by the whole court, thus confirming the opinion delivered by Lord *Ellenborough* at *Guildhall*.

In another case also it appeared, that an insurance had been made upon any of the packet-boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his Majesty should direct, for one year, from *October* 1763, to *October* 1764, upon any kinds of goods and merchandizes whatsoever. And it was agreed, that the goods and merchandizes *should be valued at the sum insured* on such packet-boat, *without farther proof of interest than the policy;* and to make no return of premium for want of interest being on bullion or goods. The insured had an interest in bullion on board the *Hanover* packet, being one of the king's packets between *Lisbon* and *Falmouth:* and it was totally lost within the time mentioned in the policy. Da Costa v. Firth, 4 Burr. 1966.

This case has already been quoted for another purpose: but on this point, the court held, that this was a policy of a peculiar sort; and was an exception out of the statute 19 *Geo.* 2. *c.* 37. It is a mixed policy; partly a wager-policy, partly an open one: and Vide ante. p. 167. 212.

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and it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is entitled as for a total loſs.

It has alſo been ſolemnly ſettled, that upon a joint capture by the army and navy, the officers and crews of the ſhips, before condemnation, have an inſurable intereſt, by virtue of the prize act, which uſually paſſes at the commencement of a war.

Le Cras v. Hughes, B. R. Eaſt. 22 Geo. III.

This was ſo held in an action upon a policy of inſurance on the ſhip *St. Domingo*, at and from *Omoa* to *London*; upon which a caſe was reſerved for the opinion of the court. The facts of the caſe were theſe: Captain *Luttrell*, commanding five of his majeſty's ſhips, and Captain *Dalrymple*, commanding a party of the land forces, captured two *Spaniſh* regiſter ſhips, lying under the protection of Fort *Omoa*: that the ſhip *St. Domingo* (on which the inſurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ſhip the defendant underwrote 500*l.*: and that the ſhip was loſt by perils of the ſea. The queſtion was, whether, by virtue of the prize act of the 19 *Geo.* 3. *c.* 67. the officers and crews of the ſhips under Captain *Luttrell* had ſuch an inſurable intereſt in the *St. Domingo*, as to entitle them to recover?

Lord *Mansfield*.—"There are two queſtions in this cauſe: 1ſt, Whether the ſea-officers had an inſurable intereſt? This will depend on the prize-act and proclamation. 2dly, Whether poſſeſſion would entitle them to inſure, upon the bare contingency of a future grant from the crown? As to the firſt, conſider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers; to the ſeamen, marines, and ſoldiers on board every ſhip and veſſel of war, the ſole intereſt and property of and in all and every ſhip and veſſel, goods, and merchandizes, which they ſhall take during the war, after condemnation. Does the act ſay, that the ſeamen only ſhall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppoſe, for inſtance, a caſe which I remember to have happened: a *Dutch* and *Engliſh* fleet combined captured ſome ſhips; the *Engliſh* ſailors could not take ſolely; nor could the act mean that they ſhould

ſhould have nothing. In the caſe in queſtion, ſuppoſe captain *Dalrymple* had given no aſſiſtance, is there any doubt that captain *Luttrell* would have taken the whole? The only difference is, that now he has not the merit of a ſole capture. The word "*ſoldiers*" in the proclamation, means ſoldiers on board the ſhip. Thus it ſtands on the act and proclamation. But ſuppoſing that doubtful, as far back as queen *Anne*'s time down to the preſent, wherever a capture has been made by a king's ſhip or a privateer, the crown has always given a grant of it after condemnation. There is no inſtance to the contrary. Is then the contingency of the ſhip's coming ſafe ſuch an intereſt as the captor may inſure? Inſurance is a contract of indemnity; ſome intereſt is neceſſary, but not any particular form of intereſt: it does not depend on a veſted formal intereſt. The queſtion is, Whether this contingency is ſuch a benefit to the aſſured, as will make it a loſs to him, if the ſhip does not arrive? An inſurance on the profits of a voyage was holden to be good. (*Vide ſupra*, *p.* 354) An agent of prizes may inſure the arrival of a ſhip, which will produce him profit; for though he has not the poſſeſſion of the property, he has ſuch an intereſt in the ſhip coming home, as that he may inſure. Here the poſſeſſion is in the aſſured, and a certain expectation of receiving the property captured from the crown, which gives him an intereſt in the arrival. It is not a veſted intereſt, but ſuch an expectation as never was defeated. Judgment for the plaintiff (*a*).

So in a more modern caſe it has been held that the captors of ſhips ſeized by them as prize have an inſurable intereſt in them, in the voyage home for the purpoſe of bringing them to adjudication in the Admiralty; ſo that although the court of Admiralty ſhould ultimately adjudge them to be no prize, and award reſtitution to the original owners, the captors are not entitled to a return of premium. The point came before the court upon a caſe reſerved at the trial.

Boehm v. Bell, 8 Term Rep. 154.

Lord *Kenyon*, after argument, obſerved, "that if it were a legal capture, the captors were entitled; if the capture were

(*a*) Since the former editions of this Book, I have had an opportunity of comparing my own note of the above caſe with that of another gentleman at the Bar; and have thereby been enabled to give a fuller account of Lord Mansfield's argument.

impro-

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improperly made, they were liable to be called to account in the court of Admiralty, where they might be amerced in damages and coſts. They had therefore a right to inſure themſelves againſt the deciſion, that might have loaded them with damages and coſts. On this ſhort ground I am of opinion that the aſſured had an inſurable intereſt, that the riſk was begun, and that there can be no return of premium."

Mr. Juſtice *Groſe*.—"The whole difficulty has ariſen from confounding an abſolute indefeaſible intereſt with an inſurable intereſt. It is not pretended that the aſſured had the abſolute property in the ſubject of inſurance; neither need they have ſuch property to make the policy legal; it is ſufficient if they had an inſurable intereſt: and according to what was ſaid by Lord *Mansfield* in *Le Cras* v. *Hughes* they certainly had an inſurable intereſt. If they had ſucceeded in the Court of Admiralty, it will be admitted that they had an inſurable intereſt; and in caſe of their not ſucceeding there, there were events in which they might be made anſwerable, and againſt which it was competent to them to inſure."

Mr. Juſtice *Lawrence*.—"The caſe turns on this ſhort queſtion, Whether or not the aſſured had an intereſt which they might inſure? Did they mean to game? or was there not a loſs againſt which they might indemnify themſelves by a policy? I do not mean a certain but a poſſible loſs. Now it has been ſhewn that this was a caſe in which the Admiralty might have decreed coſts and damages, and that is ſufficient. It might be aſked in the language of Lord *Mansfield* in *Le Cras* v. *Hughes*, Had not the inſured ſuch an intereſt in the ſhip coming home, as to entitle them to an indemnity? I think they had, and therefore the plaintiffs are not entitled to a return of premium."

So alſo the commiſſioners appointed by the act of the 35 *Geo.* 3. *c.* 80. for the purpoſe of taking care and diſpoſing of *Dutch* ſhips and effects detained in or brought into the ports of this kingdom, and who by their commiſſion are to manage, ſell, and diſpoſe of the ſame to the beſt advantage, according to the inſtructions they ſhould from time to time receive from his majeſty and the privy council, *have an inſurable intereſt in Dutch* ſhips and effects ſeized at ſea by his majeſty's ſhips of war, that

Crauford v. Hunter, 8 Term Rep. 13. See ante, p. 352. for another point.

Crauford v. Lucena, 3 B. & P. 75. in the Exch. Ch. and

they might be brought into the ports of this kingdom; they may insure in their own name, and a count in a declaration on such a policy, stating the nature of their trust, and averring that they *as such commissioners* were *interested* in the said ships and goods, and that the said insurance was made to and for their use, benefit, and account, as such commissioners, was, upon demurrer, holden to be good, the Court considering them in the light of trustees, consignees, or agents, in either of which characters it was conceived they had an insurable interest.

2 New Rep. 269 in the House of Lords.

These causes continued to agitate *Westminster Hall* for a great number of years; and the arguments have run into considerable length, all of which, both as used at the bar and by the learned judges, are fully reported in 3 *Bos.* & *Puller*, 75. and by the same gentlemen in 2 *New Rep.* from p. 269 to 329. I need hardly say, when the high character of the *British* bench is considered, that these arguments contain a great mass of erudition on the subject of insurable interest. I find it quite impossible to give those arguments in this place, without swelling my work to a size which would far exceed its original design. Besides, as the *Dutch* commission is now at an end, the precise questions agitated in these causes never can arise again. I shall therefore content myself with stating the history and the event of the suits, referring the practiser and the diligent student to the reporters.

The case was three times argued in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed by Lord *Alvanley*, Chief Justice of the Common Pleas, Lord Chief Baron *M'Donald*, *Heath* and *Rooke*, Justices; *Hotham*, *Thompson* and *Graham*, Barons, against the opinion of Mr. Justice *Chambre*. *Hil. T.* 1802. 3 *Bos.* & *Pull.* 75. A writ of error was afterwards brought upon this judgment in the House of Lords; and after much argument at the bar, several questions were referred to the learned judges, a majority of whom were for affirming the judgment of the Exchequer Chamber. But some doubts having arisen in the House of Lords, as to the extent of the damages which had been given, particularly by the then Lord Chancellor (*Erskine*), and by Lords *Eldon* and *Ellenborough*, *a venire facias de novo* was awarded in *July* 1806, which came on

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to be tried before Lord *Ellenborough* at the ſittings after *Mic. T.* 1806. In the courſe of the diſcuſſion, which had taken place, it was pretty generally underſtood, that whatever differences of opinion there might be reſpecting the intereſt of the *Dutch* commiſſioners, the Houſe of Lords, and all the judges were clearly of opinion, that his majeſty had undoubtedly an inſurable intereſt in the ſhips and cargoes taken poſſeſſion of under the authority of the above-mentioned ſtatute, therefore the Attorney General (*Gibbs*), and myſelf, who were of counſel for the plaintiffs, thought it our duty, under theſe circumſtances, to take verdicts on thoſe counts, which averred the intereſt to be in the King. Lord *Ellenborough* alſo directed the jury that in his opinion, his majeſty had a good inſurable intereſt: upon which direction the underwriters, by their counſel, tendered his Lordſhip a bill of exceptions. The parties agreed to carry the writ of error to the Houſe of Lords at once, without going through the Court of Exchequer Chamber; and at laſt, on the 29th *June* 1808, the Houſe unanimouſly, with the concurrence of all the judges, gave judgment for the aſſured, affirming the judgment of the King's Bench.

Hill and another v. Secretan, 1 Boſ. & Pull. 315.

In a caſe in the Court of Common Pleas, where a houſe in *Spain*, who were indebted to the plaintiffs, had conſigned goods to Meſſrs. *Dubois*, and indorſed the bill of lading to them, with a letter annexed, directing them to hold a part of the ſaid cargo for the uſe of the plaintiffs, who upon getting ſuch intelligence made the inſurance in queſtion, although they had given no orders for the goods, the Court held that the plaintiffs, being creditors of the houſe in *Spain*, raiſed a good conſideration for the aſſignment; and that therefore there could be no doubt that the plaintiffs had a good inſurable intereſt.

See Anderſon v. Edie, poſt.

Wolfe and another v. Horncaſtle, 1 Boſ. & Pull. 316.

So alſo in the ſame court, it was held that where a man had conſigned a cargo to the Cudbear Company in *London*, and drawn bills for the amount, but tranſmitted the bills of lading through the plaintiffs, his general agents, to be ſent to the Cudbear Company that they might inſure, and he at the ſame time drew on plaintiffs for 300*l.* which was accepted and paid: but the Cudbear Company refuſed to accept the bills drawn on them, or take to the cargo, or to inſure, upon which the plaintiffs made

insurance in their own name, and informed the consignor, who approved thereof; the plaintiffs were to be considered as consignees of the whole, and had a right in that character to insure for the benefit of their consignor; and that they had a clear insurable interest in themselves to the amount of 300*l.*

But still in the construction of the act it has always been holden, that all insurances made by persons having no interest in the event, about which they insure, or without reference to any property on board, are merely wagers, destructive of the true ends for which this contract was introduced into the mercantile world; and therefore are to be considered as absolutely null and void. See ante, Knox v. Wood.

Upon a motion for a new trial, Lord *Mansfield*, who had tried the cause, made the following report: This was an action brought by the plaintiff, who was a surgeon on board an *East Indiaman*, against the defendant, a passenger in the same ship, to recover a sum of 1000*l.* upon a special agreement, bearing date the 18th of *July* 1774; by which, after reciting, that "whereas "the plaintiff had agreed to pay to the defendant the sum of "20*l.* sterling at the next port the ship should arrive at, it was "witnessed that he the defendant, in consideration thereof, did "undertake that the said ship should save her passage to *China* "that season: and in case she did not, that then he would pay "to the plaintiff the sum of 1000*l.* at the end of one month "after the arrival of the said ship in the river *Thames*." At the trial it appeared, that the plaintiff duly paid the amount of the 20*l.* to the defendant at the next port, in pagodas: that the vessel being delayed below the Cape and *Madras* in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage. That the plaintiff had *some goods* on board, which were liable to suffer by the loss of the season; and that whilst it was still doubtful whether the ship would or would not save her passage, the captain had applied to each of the parties, to persuade them to rescind the agreement; representing that the sum to be paid in either event would be more than the loser could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant positively refused. The jury found a verdict for the plaintiff, damages 980*l.*, but I gave the defendant leave to Kent v. Bird, Cowp. 583.

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move for a new trial upon the queſtion, Whether this were not an agreement within the ſtatute 19 *Geo.* 2. *c.* 37. and therefore void?

After this caſe had been fully argued at the bar,

Lord *Mansfield* ſaid.—"A policy of inſurance is in the nature of it, a contract of indemnity, and of great benefit to trade. But the uſe of it was perverted by its being turned into a wager. To remedy this evil, the ſtatute of the 19 *Geo.* 2. *c.* 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perverſion of this ſpecies of contract; and amongſt others, that of gaming or wagering under pretence of inſuring veſſels, *&c.* proceeds under general words, to prohibit *all* contracts of inſurance by way of *gaming* or *wagering*. Here the plaintiff gives ſo much to the defendant in conſideration that the ſhip ſhould ſave her paſſage to *China*; and if not, then, upon her returning ſafe to *England*, he is to receive 1000*l.* If the firſt of theſe events happened, the defendant won; but he could not loſe, unleſs both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering polices would be turned into this form, and the act would be entirely defeated. If there is no intereſt in the caſe, it is gaming and wagering. Therefore there muſt be a new trial."

From this caſe we find, that the principle ſtated by Lord *Mansfield* in *Lewis* v. *Rucker* is confirmed: namely, that where a man inſures 2000*l.* and it turns out in proof that he has an intereſt to the value of a cable only, ſuch an intereſt will never be allowed to operate ſo as to evade the ſtatute. For in this caſe, it appeared in evidence, that the plaintiff had *ſome goods* on board; but that was held not to be an intereſt ſufficient to juſtify an inſurance ſo evidently contrary to the act of parliament.

Indeed wherever the Court can ſee upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare ſuch policy void.

The

Lowry and another v. Dougl. 468.

The plaintiffs had lent to *Lawſon*, captain of the *Lord Holland Eaſt Indiaman* 26,000*l.* for which he had given them a common bond, in the penal ſum of 52,000*l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the "adventure upon the goods from the loading thereof on board "the ſaid ſhip at *Canton*, in *China*, &c. and *upon the ſaid ſhip* "from and immediately following her arrival at *Canton* in "*China*, valued at 26,000*l.* being the amount of captain *Pa-* "*trick Lawſon*'s common bond, payable to the parties, as ſhall "be deſcribed at the back of this policy; and it bears date the "16th day of *December* 1775; and in caſe of loſs, *no other proof* "*of intereſt to be required than the exhibition of the ſaid bond;* "warranted free from average, and without benefit of ſalvage "to the inſurer."

At the head of the ſubſcription was written, "*On a bond as above expreſſed.*" Captain *Lawſon* ſailed from *China*, and arrived ſafe with his privilege (as it is called) or adventure, in *London*, on 1ſt of *July* 1777, none of the events inſured againſt having happened. The receipt of the premium was acknowledged on the back of the policy. This caſe came before the court upon an action for a return of premium, on the ground that, the policy being without intereſt, the contract was void. This caſe, as far as it relates to the queſtion of return of premium, will be conſidered in a future chapter; but in the courſe of the diſcuſſion, it became neceſſary to determine, whether the policy juſt recited was good within the ſtatute. At the trial which came on at the ſittings after *Trinity* term 1780, the Chief Juſtice was of opinion, that this was a gaming policy prohibited by the ſtatute of 19 *Geo.* 2. *c.* 37. and a verdict was given for the defendant. His lordſhip, however, having expreſſed a doubt upon the propriety of his opinion on other points of the cauſe, a motion for a new trial was afterwards made, and all the queſtions came to be debated before the court: when the majority of the judges confirmed Lord *Mansfield*'s firſt direction upon all the points. It is true Mr. Juſtice *Willes* differed from his brethren upon that occaſion; the learned judge being of opinion, upon the queſtion relating to our preſent inquiry, that this was not a gaming

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policy: that it did not appear to him, that the parties had any idea they were entering into an illegal contract: that the whole was diſcloſed, and they *thought* there was an intereſt; this was a miſtake; but it is a new point of law.

The three other judges ſupported their opinions upon the following grounds.

Lord *Mansfield*.—"It is certainly true, in many inſtances, that firſt thoughts are beſt. I am now very much inclined to my firſt opinion. There are two ſorts of policies of inſurance; mercantile and gaming policies. The firſt ſort are contracts of indemnity, and of indemnity only; and from that principle a great variety of deciſions and conſequences have followed. The ſecond ſort may be the ſame in form; but in them there is no contract of indemnity, becauſe there is no intereſt upon which a loſs can accrue. They are mere games of hazard, like the caſt of a die. In the preſent caſe the nature of the inſurance is known to both parties. The plaintiffs ſay, "We mean to "game: but we give our reaſon for it; Captain *Lawſon* owes "us a ſum of money, and we want to be ſecure in caſe he "ſhould not be in a ſituation to pay us." It was a hedge. But they had no intereſt; for if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiffs would have been entitled to recover the amount of the bond from *Lawſon*. This then is a gaming policy; and againſt an act of parliament."

Mr. Juſtice *Aſhhurſt*.—"A policy of inſurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which ſhews deciſively that this was a gaming policy."

Mr. Juſtice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of fact. If the *law* was miſtaken, the rule applies, that *ignorantia juris non excuſat*. This was a mere gaming policy without intereſt." Agreeably to this opinion, the rule for a new trial was diſcharged.

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The ſecond ſection of the act in queſtion, which allows of inſurances being made on private ſhips of war, intereſt or no intereſt, ſeems ſufficiently clear, and requires no explanation.

The third ſection, by which inſurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the poſſeſſion of the crowns of *Spain* or *Portugal* may be effected in the manner practiſed before this act was paſſed, ſeems to be obſcurely worded. The learned commentator upon the law of *England* obſerves, that the reaſon of this proviſo is ſufficiently obvious. Not withſtanding this authority, in order to comprehend the meaning of the legiſlature, we muſt obſerve, that the trade from *Spain* and *Portugal*, to their reſpective colonies and eſtabliſhments in *South America*, and the returns thereof, can only be carried on by their own ſubjects; and all other perſons are prohibited from that trade by poſitive regulations of theſe reſpective ſtates. The conſequence of ſuch a prohibition is, that all the goods and merchandizes which the ſubjects of this and other countries export from *Spain* and *Portugal*, muſt be in the names of *Spaniſh* ſubjects. So that it was abſolutely neceſſary to make this exception (for no other proof but the policy itſelf can be brought); otherwiſe all inſurances upon that branch of trade muſt have been entirely void. The words, however, ſeem to allow a greater latitude than was meant by the legiſlature in making ſuch a proviſion, for by adverting merely to the words, inſurances from any ports or places in *Europe* or *America*, belonging to *Spain* and *Portugal*, to *England* or other ports of *Europe* may be made, as if this act had never paſſed. Whereas by attending to the prohibition of trade juſt mentioned to any but the ſubjects of *Spain* and *Portugal*, as the commerce between theſe colonies and the parent countries can only be carried on by ſubjects, it is evident that the legiſlature intended rather to have ſaid, that inſurances on goods from ports belonging to *Spain* and *Portugal* in *Europe* to any ports in *America* belonging to thoſe courts; and from ſuch ports in *America* to ſuch ports or places in *Europe*, ſhall be valid and effectual contracts, than to authorize inſurances from the dominions of *Spain* and *Portugal* in *Europe* or *America*, to whatſoever place in the world the ſhip, in which theſe goods are to be carried, may happen to be deſtined. The words, however, certainly admit of that

Mr. Juſtice Blackſtone, 2 Vol. Com. 460.

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broad conſtruction: for the place of deſtination is not aſcertained.

Upon this ſection of the act, it may be obſerved, that the equitable conſtruction of ſuch contracts of inſurance as are protected by it, ſeems to be, that they may be made without intereſt, notwithſtanding the caſe of *Goddart* v. *Garrett*, above cited: ſince in ſuch inſtances it is impoſſible for the perſon inſured to bring any certain proof of intereſt on board.

Vide ante, p. 345.

Hitherto we have ſpoken merely of that part of this very ſalutary act, which requires, that every perſon making ſuch a contract, ſhould have an intereſt in that, which is the object of the inſurance. Another part of it ſtill claims our attention, that which prohibits re-aſſurances. What a re-aſſurance is; in what caſes it is prohibited; and when it is allowable, will form the ſubject of the following chapter.

CHAPTER THE FIFTEENTH.

Of Re-Aſſurance, and Double Inſurance.

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RE-ASSURANCE, as underſtood by the law of *England*, may be ſaid to be a contract, which the firſt inſurer enters into, in order to relieve himſelf from thoſe riſks which he has incautiouſly undertaken, by throwing them upon other underwriters, who are called re-aſſurers. This ſpecies of contract has obtained a place in moſt of the commercial ſyſtems of the trading powers of *Europe*; and it is allowed by them at this day to be politic and legal. The learned *Roccus* has decided expreſsly in favour of it; and has cited many reſpectable authorities in ſupport of his opinion. "Aſſecurator, poſt factam aſſecurationem, "poteſt ſe aſſecurari facere ab alio aſſecuratore, et iſte ſecundus "aſſecurator tenetur pro aſſecuratione facta a primo, et ad ſol- "vendum omne totum, quod primus aſſecurator ſolverit, et iſta "ſecunda aſſecuratio valet." By the ancient law of *France* ſuch aſſurances were reckoned valid, and perfectly conſiſtent with equity and good conſcience. The author of the Guidon obſerves, that if it ſo happen that the inſurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the riſk, they are at liberty to re-inſure; but ſtill they cannot prevent the inſured from making his demand upon them in caſe of loſs, for having, by their ſignature, promiſed indemnity, they cannot, by any proteſtations to the contrary, diſcharge themſelves from their reſponſibility, without the conſent of the inſured. *Lewis* the Fourteenth, when, by the aſſiſtance of the famous *Colbert*, he promulgated thoſe ordinances, which will be a laſting honour to the *French* nation, adopted the idea that prevailed when the Guidon was written: for by an article in that celebrated code of laws, he expreſsly declared, "that it ſhould "be lawful to the inſurers to make re-aſſurance with other men "of thoſe effects, which they had themſelves previouſly inſured." It is not in *France* alone that this law prevails; for by the poſitive and expreſs regulations and ordinances of *Koninſberg*, *Humburgh*,

Roccus de Aſſecur. not. 12.

Le Guidon, c. 2. art. 19.

Ord. Lewis 14. tit. Aſſurance, art. 20.

2 Mag. 190. 233. 419.

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Hamburgh, and *Bilboa*, re-assurances are allowed to be effected, and consequently are lawful contracts.

By the passage cited from the Guidon it might be observed, that it was a distinguishing character of this species of contract, that notwithstanding a re-insurance, the first contract subsists as at first, without change or amendment. The re-insurer is wholly unconnected with the original owner of the property insured; and as there was no obligation between them originally, so none is raised by the subsequent act of the first underwriter. The risks of the insurer form the object of the re-insurance, which is a new independent contract, not at all concerning the insured; who consequently can exercise no power or authority with respect to it.

1 Emerigon, p. 247.

Pothier, tit. Assurance, No. 96.

Agreeably to the laws of those countries just referred to, and consistently with the opinions of those respectable writers, whose works we have had such frequent occasion to mention, the law of *England* adopted their regulations, and permitted the underwriters upon policies to insure themselves against those risks for which they had inadvertently engaged to indemnify the insured; or where perhaps they had involved themselves to a greater amount, than their ability would enable them to discharge. Although such a contract seems perfectly fair and reasonable in itself, and might be productive of very beneficial consequences to those concerned in this important branch of trade; yet, like many other useful institutions, it was so much abused, and turned to purposes so pernicious to a commercial nation, and so destructive of those very benefits it was originally intended to promote and encourage, that the legislature was at last obliged to interpose, and by a positive law to cut off all opportunity of practising those frauds in future, which were become thus glaring and enormous.

19 Geo. II. c. 37. § 4.

Accordingly by the fourth section of that statute, which formed the subject of the preceding chapter, it was enacted, "that it should not be lawful to make RE-ASSURANCE, unless "the assurer should be insolvent, become a bankrupt, or die; in "either of which cases, such assurer, his executors, administrators, or assigns, might make re-assurance, to the amount "before

" before by him assured, provided it should be expressed in the " policy to be a re-assurance.

From this act it is apparent that all kinds of re-assurance are not prohibited; but wherever such a contract tends to the advancement of commerce, or to the real benefit of an individual, in such a case it shall be permitted. Thus in case of insolvency or bankruptcy, it is advantageous to the creditors in general, as well as to the individual, that a re-assurance should be made; for by these means the fund of the bankrupt's estate is not diminished in case of loss, and the insured has a better security for the payment of the amount of his damage, or at least a proportion of it (*a*). If the insurer die, it is no less necessary and beneficial to his successors, that there should he a re-assurance, than it was in the former case of a bankruptcy: because it will provide assets to satisfy the insured in case a loss should happen,

(*a*) Formerly, if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend out of the bankrupt's estate. This being found a heavy inconvenience, and a discouragement to trade, parliament was obliged to interpose, and to alter the law in this respect. The statute recited, " that merchants and traders frequently lend money on bottomry, or at *respon-* " *dentia*, and in the course of their trade, frequently cause their ships or vessels, and the " goods and merchandizes loaded thereon, to be insured; and that where commissions " of bankruptcy have issued against the obligor in such bottomry or *respondentia* bond, " or the underwriter, or assurer in such insurance, before the loss of the ship or goods, " in such bond or policy of insurance mentioned, had happened, it had been made a " question, Whether the obligee or obligees in such bond, or the assured in such policy " of insurance, should be let in to prove their debts, or be admitted to have any benefit " or dividend under such commission? which might be a discouragement to trade." It was therefore enacted, " that the obligee in any bottomry, or *respondentia* bond, and " the assured in any policy of insurance, made and entered into, upon a good and valu- " able consideration, *bona fide*, should be admitted to claim; and after the loss or con- " tingency should have happened, to prove his, her, or their debt and demands, in re- " spect of such bond or policy of insurance, in like manner as if the loss or contingency " had happened before the time of the issuing of such commission of bankruptcy against " such obligor or insurer; and should be entitled unto, and should have and receive, a " proportionable part, share and dividend of such bankrupt's estate in proportion to the " other creditors of such bankrupt, in like manner, as if such loss or contengency had " happened before such commission issued: and that all and every person and persons " against whom any commission of bankruptcy should be awarded, should be discharged " of and from the debt or debts, owing by him, her, or them, on every such bond and " policy of insurance as aforesaid, and should have the benefit of the several statutes now " in force against bankrupts in like manner, to all intents and purposes, as if such loss " or contingency had happened, and the money due in respect thereof had become pay- " able before the time of the issuing out the commission." 19 Geo. II. c. 32. s. 2.

and

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and thus ſecure the eſtate of the deceaſed for the benefit of his heirs. Indeed, in both caſes, the intention of the legiſlature ſeems to have been, to provide a fund for the payment of that proportion, which, in caſe of an inſolvency, the inſured will have a right to demand, in common with the other creditors; and for the payment of the whole, without prejudice to the heir, even in caſes where the anceſtor, at the time of his death, was in ſolvent circumſtances.

This act is worded in ſuch expreſs terms, excluding every ſpecies of re-aſſurance, except in the three inſtances of death, bankruptcy, or inſolvency, that a doubt, as it ſhould ſeem, could hardly be founded upon it. But as it was held, that the firſt clauſe of the ſtatute, prohibiting inſurances, *intereſt or no intereſt*, did not extend to foreign ſhips; ſo it was argued, that re-aſſurances made here on *the ſhips of foreigners* did not fall within the act. It might have occurred, however, that the firſt clauſe of the ſtatute is qualified, and only prohibits ſuch inſurances when made *on his majeſty's ſhips, or the ſhips belonging to his Majeſty's ſubjects:* whereas the clauſe in queſtion is general and without reſtriction; the inference from which is, that the legiſlature had both objects in view, and meant wholly to prohibit the one, but not the other.

Vide ante, c. 14.

Andree v. Fletcher, 2 Term Rep. 161.

This point came on to be conſidered by the court of King's Bench, in the year 1787, in the form of a ſpecial caſe, ſtating, that a re-aſſurance was made by the defendant on *a French veſſel*, firſt inſured by a *French underwriter at Marſeilles*, who was living, and who, at the time of ſubſcribing the ſecond policy, was ſolvent.

The court (*Aſhhurſt*, *Buller*, and *Groſe*, juſtices,) were unanimouſly of opinion, that this policy of re-aſſurance was void: and that every re-aſſurance in this country, either by *Britiſh* ſubjects or foreigners, on *Britiſh* or foreign ſhips, is void by the ſtatute; *unleſs the firſt aſſurer be inſolvent, become a bankrupt, or die.*

Le Guidon, c. 2. art. 20.

There is another ſpecies of re-aſſurance allowed by the laws of *France*, as eſtabliſhed by an ordinance of *Lewis* the Fourteenth, which was alſo taken from that ancient and excellent

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French treatiſe, that has been ſo frequently mentioned. By this regulation, it is declared lawful for the aſſured to inſure the ſolvency of the underwriter. By theſe means, the perſon inſured gets rid of thoſe fears, which he may have conceived concerning the ability of the inſurers to pay, and he gains a ſecond ſecurity to anſwer for the ſufficiency of the firſt. But it is not to *France* alone that this kind of contract is reſtrained; for by the poſitive laws of many other maritime ſtates, ſuch re-aſſurances are valid and binding contracts. The *Engliſh* ſtatute, which has been the ſubject of this and the preceding chapter, takes no expreſs notice of this ſort of inſurance; becauſe, in truth, I believe, it never was very much in practice in *England*: but, however, it ſeems clear, that ſuch a circumſtance, as the ſolvency of the underwriter, is not an inſurable intereſt; that a policy opened upon ſuch an event would be treated as a wager-policy; and would conſequently fall within the ſtatute of *George* the Second, which declares all policies made by way of gaming or wagering, to be abſolutely null and void to all intents and purpoſes.

Ord. of Lew. 14. tit. Aſſurance, art. 20.

2 Mag. 190. 419.

Having ſaid thus much of re-aſſurances, I ſhall proceed to conſider the nature of a double inſurance, and to ſtate the few caſes that have been determined upon the ſubject. I treat of it in this place, becauſe theſe two kinds of inſurance have been ſometimes confounded together, and ſuppoſed to mean the ſame thing: whereas no two ideas can be more diſtinct. We have already ſeen what is meant by a re-aſſurance. A double inſurance is where the ſame man is to receive two ſums inſtead of one, or the ſame ſum twice over, for the ſame loſs, by reaſon of his having made two inſurances upon the ſame goods or the ſame ſhip. The firſt diſtinction between theſe two contracts is, that a re-aſſurance is a contract made by the firſt underwriter, his executors or aſſigns, to ſecure himſelf, or his eſtate: a double inſurance is entered into by the inſured. A re-aſſurance, except in the caſes provided for by the ſtatute, is abſolutely void: a double inſurance is not void; but ſtill the inſured ſhall recover only one ſatisfaction for his loſs. This requires explanation. Where a man has made a double inſurance, he may recover his loſs, againſt which of the underwriters he pleaſes, but he can recover for no more than the amount of his loſs. This depends upon the nature of an inſurance, and the great principles of juſtice and good faith. An inſurance is merely a contract of

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1 Bur. 496.

19 Geo. II. c. 37. ſ. 4. 1 Black. Rep. 416.

1 Burr. 492.

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indemnity in case of loss: it follows as a necessary consequence that a man shall not recover more than he has lost, or recover satisfaction greater than the injury he has sustained. This rule was wisely established, in order to prevent fraud, lest the desire of gain should occasion unfair and wilful losses. It being thus settled, that the insured shall recover but one satisfaction, and that in case of a double insurance, he may fix upon which of the underwriters he will for the payment of his loss, it is a principle of natural justice that the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured.

These principles have been fully declared to be law in several cases, which are now to be mentioned.

Newby v. Reed, Sitt. in London in Easter Vac. 1763. 1 Blac. Rep 416.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Rogers v. Davis, Sitt. in Mich. Vac. 17 Geo. III. before Lord Mansfield.

Thus also it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *St. John's* the 17th of *December* 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.* and has paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was intitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was however a verdict for the plaintiff for his

his full demand, *with liberty for the defendant to bring an action againſt the Liverpool underwriters, if he thought fit.* CHAP. XV.

Accordingly in the *Eaſter* term following, an action was brought for money had and received to the uſe of the plaintiff, who was the defendant in the laſt clauſe, in order to recover a contribution for the loſs which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the ſubject of the former action), 2200*l.* were inſured: that on the two *Liverpool* policies 1700*l.* were inſured: that the merchant was intereſted to the amount of 500*l* on the ſhip; 300*l.* on the freight; and 1400*l.* on the cargo, that the plaintiff had paid 200*l.* loſs, and 47*l.* for the coſts. The queſtion was, whether the defendant was liable to contribute any thing, and what. The whole intereſt was 2200*l.* and the whole inſurance was 3900*l.* It was inſiſted by the counſel for the defendant, that the inſurance in *London* was an illegal re-aſſurance; and therefore the plaintiff might have made a good defence in an action brought againſt him: and if ſo, he could not now recover over againſt the defendant. Davis v. Gildart, Sitt'ngs in Eaſt. Vac. 17 Geo III. at Guild-hall.

Lord *Mansfield*.—"The queſtion ſeems to be, whether the inſured has not two ſecurities for the loſs that has happened. If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſecurities; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the ſecond inſurance is void as a *re-aſſurance*. But a re-aſſurance is a contract made by the inſurer to ſecure himſelf; *and this is only a double inſurance.*" There was another ground taken in the cauſe, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double inſurance, ſhall not be allowed to recover a double ſatisfaction for the ſame loſs; yet various perſons may inſure various intereſts on the ſame thing, and each to the whole value (as the maſters for wages; the owner for freight; one perſon for goods, another for bottomry), and ſuch a contract does not fall within the idea of a double inſurance. There is a full caſe upon this ſubject, and a very elaborate argument of Lord *Mansfield*, in delivering the judgment 1 Bur. 496.

of

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Godin and others v. The London Assu. Comp. 1 Burr. 489. 1 Blac. Rep. 103.

of the whole court of King's Bench, in which most of the questions relative to double insurances are clearly and decisively settled. In this cause the question was, Whether the plaintiff ought to recover his whole loss, or only a half? it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the court upon Lord *Mansfield*'s report.

Lord *Mansfield*, in delivering the opinion of the court, began, by stating the facts, as they appeared to him at the trial.

Mr. *Meybohm of St. Petersburg* had dealings with Mr. *Amyand* and Company of *London*, who often sent ships from *London* to Mr. *Meybohm* at *St. Petersburg*. *Meybohm*, as appeared by the evidence, was indebted, on the balance of their accounts, to *Amyand* and Company. *Amyand* and Company sent a ship, called *The Galloway*, *Stephen Barker* master, to Mr. *Meybohm*, at *St. Petersburg*, to fetch certain goods. *Meybohm* sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards, in *August* 1756, *Amyand* and Company got a policy of insurance from private underwriters, for 1100*l.* on the ship, tackle, and goods, at and from *London* to *St. Petersburg*, and at and from thence back again to *London*: which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{11}{20}$ parts of the ship, and the remaining 600*l.* to be on goods. Between the 26th of *August* and the 28th of *September* 1756 (both included), Mr. *Amyand* insured 800*l.* more, with other private insurers: and this latter insurance was upon goods only: and was only at and from *St. Petersburg* to *London*. On the 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* insured 900*l.* more with other private insurers, which last insurance was on goods only, at and from the *Sound* to *London*. So that the whole sum insured by *Amyand* and Company was 2800*l.* of which the sum of 2300*l.* was on goods, and the remaining 500*l.* was on the ship. Several letters being given in evidence, it appeared that *Meybohm* wrote from *Petersburg* on the 7th of *September* 1756 (the date of his first letter on this subject) to *Amyand* and Company; and mentioned what goods he should send to them, referring to the invoice for particulars; and directed them to get insurance thereon

on, and to place the goods and the insurance to a particular account which he named in his letter; in which he also specified some iron, which was for Mr. *Amyand*'s own account. This letter Mr. *Amyand* afterwards received (probably about the 27th of *October*,) and in consequence of it made the insurance accordingly, upon the 28th, 29th, and 30th of the same *October*, as before-mentioned. *Meybohm*, having shipped the goods, indorsed the bills of lading to one Mr. *John Tamesz* in *Moscow* (the plaintiff, in effect, in the present action) who, on the 7th of *October* 1756, wrote to his correspondent Mr. *Uhthoff* here in *London* to insure these goods. In this letter he desires Mr. *Uhthoff* to insure the *whole*, that he (*Tamesz*) might be safe in all events; for he suspected that these goods where intended to be consigned by *Meybohm* to somebody else, and perhaps might be insured by some other persons. And he says they were transferred to him, in consideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tamesz*, with these directions to insure, was recived by Mr. *Uhthoff*, on the 15th of *November* 1756. Mr. *Uhthoff* accordingly applied to the defendants, the *London* Assurance Company; and discloſed to them, at the same time, all these particulars: and they, upon the 16th of *November* 1756, after being thus appriſed, *that there might be another insurance*, made the insurance now in question, for 2316*l.* on the goods at and from the *Sound* to *London*. The goods were lost in the voyage. Mr. *Uhthoff*'s insurance was made by the plaintiffs *Godin*, *Guyon*, and Company, who are insurance brokers: and they declare that this insurance was made by order of *Henry Uhthoff* esq. This declaration is indorsed upon the policy, and is dated the 18th of *November* 1756. There is no doubt as to the value of the goods, or as to the loss of them. It is admitted by the defendants, that the plaintiffs ought to recover half the loss from them: but they say they ought to pay *only half*, not the *whole* of the loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the *whole loss* from the present defendants; or only the *half* of his loss from *them*, and the remainder from the underwriters of Mr. *Amyand*'s policy. The verdict is found for the plaintiff, for the whole: but it is agreed to be subject to the opinion of this court, upon the question I have just mentioned.

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First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole: for they have received a premium for the whole risk. Before the introduction of wagering policies, it was upon principles of convenience very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss; and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them *contribute pro rata*, to satisfy that loss, against which they have all insured. No particular cases are to be found on this head: or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole. But in this case if *Tamesz* was not to have the benefit of both policies in all events, then it can never be considered as a double policy.

It has been said, that the indorsement of the bills of lading transferred *Meybohm*'s interest in all policies, by which the cargo assigned was insured; and therefore *Tamesz* has a right to Mr. *Amyand*'s policy; and that *Tamesz*, being the assignee of *Meybohm*, is the *cestuy que trust* of it, and may recover the money insured; and even that he may bring trover, or detinue, for the very policy itself: and it is urged from hence, that he either will or may have a double satisfaction for the same loss.

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But allowing that by the indorſement of the bills of lading and aſſigning the cargo to *Tameſz*, he ſtands in the place of *Meybohm* in reſpect of his inſurances; yet Mr. *Amyand* has an intereſt of his own, and had actually inſured the ſhip and goods, to the amount of 1900*l.* (upon both together) prior to any directions or intimation received from Mr. *Meybohm*, to inſure for him. Various people may inſure various intereſts on the ſame bottom: (as one perſon for goods, another for bottomry, *&c.*) And here Mr. *Amyand* had an intereſt of his own, diſtinct from that of Mr. *Meybohm*: he had a lien upon theſe very goods as a factor to whom a balance was due, And he had the ſole intereſt in the ſhip; which was a part of the things inſured by him. It is far from appearing, that even his laſt inſurance (in *October*) was made on the account of *Meybohm*, or as agent for him. So far from it, Mr. *Amyand* inſiſts upon it for his own benefit (as he expreſsly declared at the trial), and abſolutely refuſes to give it up, or to ſuffer his name to be uſed by the plaintiff; though he was a witneſs for the defendants, and was produced by them, and inclined to ſerve them. So that the foundation of this argument, urged by the defendant's counſel, fails them; and there is, in reality, nothing to ſupport it. But even ſuppoſing that Mr. *Amyand* had made his inſurance, not upon his own account, but as agent or factor for Mr. *Meybohm*, and upon the account of *Meybohm*; yet even then *Tameſz* can never come againſt *Amyand*'s underwriters, or come at *Amyand*'s policy to his own uſe. For *Amyand*, the factor of *Meybohm*, has poſſeſſion of the policy, and appears to have been a creditor of *Meybohm* upon the balance of accounts between them, at the time when he made the inſurance: and I take it to be now a ſettled point, "that a factor to whom a balance is due, has a "lien upon all goods of his principal, ſo long as they remain in "his poſſeſſion." *Kruger* and others v. *Wilcox* and others, was a caſe in Chancery upon this point. It came on firſt before Sir *John Strange*, then Maſter of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ſhip or cargo, and reſerved all further directions till after the maſter's report. It came on again, afterwards, for further directions, after the maſter's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publickly. After which he took time to conſider of it; and on the firſt of *Febru-*

Ambler's Rep. 252.

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ary 1755, decreed, "that the factor has a lien on goods consigned to him; not only for incident charges, but as an item of mutual account for the general balance due to him so long as he retains the possession. But if he part with the possession of the goods, he parts with his lien, because it cannot then be retained as an item for the general account." There was another case, in the same court, of *Gardiner* v. *Coleman*, a few months after; in which the former case, determined as I have mentioned, was considered as a point settled; and this latter case of *Gardiner* v. *Coleman* was decreed agreeably to it. So that Mr. *Amyand*, even considered as factor or agent to *Meybohm*, and as making the insurance upon *Meybohm*'s account, is yet entitled to retain the policy; *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy, whilst it continues in his possession. Therefore, even in this view of the case, Mr. *Tamesz* must first have paid to *Amyand* the balance of his (*Amyand*'s) account, before he could have gotten that policy out of *Amyand*'s hands; and consequently, Mr. *Tamesz* was very far from being entitled to the benefit of it as a *cestuy que trust*, absolutely and entirely.

But if the question, "Whether *Tamesz* could take the benefit of Mr. *Amyand*'s policy?" were doubtful; yet here, *Tamesz* insured the goods with the defendants, expresly under the declaration of his suspicion, that there might have been a former consignation, and some former insurance made upon the goods by some other person: but he desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. Mr. *Amyand* insisted upon his right to the whole benefit of his own policy, when he was examined as a witness: and is now litigating it in Chancery. It would neither be just nor reasonable, that *Tamesz* should only recover half of his loss from the defendants, and be turned round for the other half, to the uncertain event of a long and expensive litigation. I do not believe there ever will or can be a recovery by *Tamesz*, or those who shall stand in his place, against *Amyand*'s underwriters. However, if those underwriters are liable to contribute at all, the contribution ought to be among the several insurers themselves: but *Tamesz*, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by which they are bound to pay the whole. For though here be

be two insurances, yet it is not a double insurance; to call it so is only confounding terms. If *Tamesz* could recover against both sets of insurers, yet he certainly could not recover against the underwriters of *Amyand*'s policy, without some expence; nor without also first paying and re-imbursing to Mr. *Amyand* the premium he paid, and also his charges. This is by no means within the idea of a double insurance. Two persons may insure two different interests; each to the whole value; as the master for wages; the owner for freight, *&c.* But a double insurance is where the same man is to receive two sums instead of one, the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods, or the same ship. Mr. *Tamesz* is entitled to receive the whole from the defendants, upon their policy; whatever shall become of Mr. *Amyand*'s policy: and they will have a right in case he can claim any thing under Mr *Amyand*'s policy, to stand in his place, for a contribution to be paid by the other underwriters to them. But still they are certainly obliged to pay the whole to him. Therefore upon these grounds and principles, in every light in which the case can be put, we are all of us clearly of opinion, that the verdict is right, as it now stands for the whole; and that the *postea* must be delivered to the plaintiff.

In the course of what has been said upon double insurance, no notice has been taken of the laws of foreign states respecting that point: the reason of this silence is the great contrariety to be found in their laws upon the subject; it being almost impossible to mention two countries, whose regulations, as to this matter, are similar, In one the contract is absolutely void, and a forfeiture ensues: in others, if the first policy amount to the value of the effects laden, the other insurers shall withdraw their insurance, retaining one half *per cent.* and in some other countries, the double insurance is merely void, without any forfeiture being incurred. When there is such a diversity in the ordinances upon the subject, it seemed needless to enter into them, especially as the law of *England* with respect to double insurance is so clear, and so well-founded in reason and natural justice, as to require no illustration or confirmation from the laws of any other country.

Ord. of Middleb. 2 Mag. p. 77. Ord. of Fran. and Stockh. 2 Mag. 172. 267. Ord of Bilb. 2 Magens, p. 411.

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Having, in this and the five preceding chapters, treated of thoſe circumſtances, by which the contract of inſurance is rendered void from its commencement, on account of ſome radical defect, which prevents the policy from ever having any operation at all, and having, in the courſe of that inquiry, been led into a variety of diſcuſſion, involving in it a very material part of the law of inſurance: we ſhall proceed to ſhew in what caſes the policy, although not void *ab initio*, is rendered of no effect, becauſe the inſured has not himſelf fully complied with thoſe conditions, which he has either *expreſsly* or *tacitly*, from the nature of his contract, undertaken to perform. It was indeed obſerved in the firſt chapter of this work, that although the policy is not ſubſcribed by the inſured, yet there are certain conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwiſe it is a dead letter, and he can never recover an indemnity for any loſs, which he may happen to ſuſtain.

Vide ante, P. 1.

CHAPTER THE SIXTEENTH.

Of Changing the Ship.

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OF thoſe cauſes which will operate as a bar to the inſured's recovering upon a policy of inſurance againſt the underwriter, the firſt to be mentioned is that of changing the ſhip; or, as it has commonly been called, changing the bottom. This will require but very little diſcuſſion. We formerly ſaid, that, except in ſome ſpecial caſes of inſurances upon *ſhip or ſhips*, it was eſſentially requiſite to render a policy of inſurance effectual, that the name of the ſhip, on which the riſk was to be run, ſhould be inſerted. That being done, it follows as an implied condition that the inſured ſhould neither ſubſtitute another ſhip for that mentioned in the policy before the voyage commences, in which caſe there would be no contract at all: nor during the courſe of the voyage remove the property inſured to another ſhip, without the conſent of the underwriter, or without being impelled by a caſe of unavoidable neceſſity. If he do, the implied condition is broken, and he cannot recover a ſatisfaction, in caſe of a loſs, from the inſurer; becauſe the policy was upon goods on board a particular ſhip, or upon the ſhip itſelf; and it becomes a material conſideration in a contract of inſurance, upon what veſſel the riſk is to be run; ſince the one may be much ſtronger, and more able to reſiſt the perils of the ſea; or by its ſwift ſailing, much better able to eſcape from the purſuit of an enemy, than the other.

Vide ante, c. 1.

Malyne, it is true, in his *Lex Mercatoria*, appears to be of a different opinion; for he ſays, "It ſometimes happens, that "upon ſome ſpecial conſideration, this clauſe forbidding the "transferring of goods from one ſhip to another is inſerted in "policies of aſſurance; becauſe in time of hoſtility or war be- "tween princes, it might be unladen, in ſuch ſhips of thoſe "contending princes, by which the adventure would be in- "creaſed. But according to the uſual inſurances which are "made generally without an exception, the aſſurer is liable "thereunto; for it is underſtood, that the maſter of a ſhip, "without

Mal. Lex Merc. 118.

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"without some good and accidental cause, would not put the "goods from one ship to another, but would deliver them, ac- "cording to the charter-party, at the appointed place." The reason given by *Malyne*, in support of his position, is by no means satisfactory, nor is it well founded in point of experience: neither has he adduced a single authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way: at least, as far as I have been able to trace it.

Molloy, l. 2, c. 7. s. 11.

Molloy has said, that if goods are insured in such a ship, and afterwards in the voyage she becomes leaky and crazy, and the supercargo and master, by consent, become freighters of another vessel for the safe delivery of the goods; and then after she is loaded, the second vessel miscarries, the assurers are discharged. It is true, the sentence proceeds thus: "If these words be in- "serted, namely, *the goods laden to be transported and delivered at* "*such place by the said ship, or by any other ship, or vessel, until they* "*be safely landed*, the insurers must answer the misfortune." But this does not at all affect the general rule before laid down; for it only goes to shew that, which is not denied, that the parties may take a case out of the general rule of law, by a special agreement: and the exception proves the truth of the first proposition. Besides, in such a case, it should seem that the ship, in which the goods are laden, ought not to be changed, but upon necessity.

Roccus de Assecurat. No. 28.

This opinion is confirmed by foreign writers. "Merces si "eâdem navigatione transferantur de unâ navi in aliam, et si "noviſſima navis, ubi merces transfusæ fuerunt, deperdatur, "tunc est inspicienda forma assecurationis, in quâ si fuit dictum, "quod assecurentur merces, *quæ sunt in tali navi*, tunc *assecurator* "*non tenetur*, eo quod mentionem fecit in assecuratione de tali "navi. Et ratio est, quia non par est ratio assecurationis, *quan-* "*do merces devehuntur in unâ navi, et quando in alterâ*; imo solet "id principaliter considerari inter ipsos assecuratores, cum *una* "*navis sit magis fortis quam alia*." *Roccus* is corroborated by several learned writers upon this branch of jurisprudence.

Santer, de Assecurat. p. 3. n. 35. Stracca glos. 8. n. 10.

In the law of *England*, there is only one case to be met with in print upon the subject; and that is not expressly in point to the

the preſent inquiry, although it ſeems to decide it. It was a caſe which came on at *Guildhall* before Lord Chief Juſtice *Lee*. The plaintiff had inſured intereſt or no intereſt on *any ſhip* he ſhould come in from *Virginia* to *London*, beginning the adventure *on his embarking* on board ſuch ſhip; the money to be paid though his perſon ſhould eſcape, or the ſhip be retaken. He embarked on the *Speedwell*; but ſhe ſpringing a leak at ſea, he went on board the *Friendſhip*, and arrived ſafe at *London*; but the *Speedwell* was taken after he left her. And now, in an action againſt the underwriter, he was held liable; for the inſurance is on the ſhip the plaintiff ſet out in: *and had that got ſafe home and the other been loſt*, the plaintiff could not have recovered upon the ground of having removed his perſon into that ſhip in the middle of the voyage.

Dick v. Barrell, 2 Srra. 1248.

From this caſe it appears, that although no ſhip was named in the policy, yet the moment the ſhip was aſcertained by the embarkation of the inſured, the contract was at an end, provided the ſecond ſhip had been loſt; for ſo the words in *Italics* expreſsly import. *A fortiori*, therefore, the inſured could not be entitled to recover, upon a change of the bottom, when the name of the veſſel is expreſsly mentioned in the very inſtrument by which the contract is effected. And although the inſured, notwithſtanding the change of bottom, recovered in the caſe cited from *Strange*; it may be accounted for in two ways, conſiſtent with the doctrine advanced in this chapter. In the firſt place, it was a gaming policy, intereſt or no intereſt; and the plaintiff was entitled to recover the moment the ſhip was taken, although he might perhaps not be intereſted at all; or perhaps the effects inſured might be left in the firſt ſhip, although the plaintiff removed his perſon; in which caſe even at this day, upon a fair *bonâ fide* policy, he would be entitled to recover from the underwriters a ſatisfaction for the loſs he had ſuſtained.

The general doctrine relative to changing the bottom of the ſhip was alluded to by Lord *Mansfield*, when delivering the opinion of the court in the caſe of *Pelly* againſt the *Royal Exchange* Aſſurance Company, which has already been fully reported in a preceding chapter. "One objection," ſaid his Lordſhip, "was formed by comparing this caſe to that of "changing the ſhip or bottom, on board of which goods are "inſured:

Vide ante, c. 2. p. 55.
1 Burr. 351.

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" insured: *which the insured have no right to do* (*a*). For there " the identical ship is essential; *that* is the thing insured. But " that case is not like the present."

From this passage it is evident, that Lord *Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an insurance is made on a specific ship, and the insured not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter.

(*a*) This is to be taken as a rule, subject to the exception of inevitable or urgent necessity: for it has been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they act from necessity, and for the benefit of all concerned. See *Plantamour* v. *Staples*, 1 Term Rep. 611. note (a) and ante, chap. 1.

CHAPTER THE SEVENTEENTH.

Of Deviation.

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DEVIATION, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined; and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done; if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such a deviation; it is but just and reasonable that the underwriter should no longer be bound by his contract, the insured having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that, against which the insurer has undertaken to indemnify: (which is the true objection to a deviation) the risk may be ten times greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

Vide ante, c. 1.

Roccus, Not. 52.

Dougl. Rep. 288.

These principles have been established by many decisions in the various courts of *Westminster Hall*; and also by a solemn determination in the House of Lords.

The plaintiff was a shipper of goods in a vessel bound from *Dartmouth* to *Liverpool*: the ship sailed from *Dartmouth*, and put into *Loo*; a place *she must of necessity pass by*, in the course of the insured voyage. But as she had no liberty given her by the policy

Fox v. Black, Exeter assizes, 1767, before Mr. Justice Yates.

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policy to go into *Loo*, and although no accident befel her in going into, or coming out of *Loo* (for she was lost after she got out to sea again), yet Mr. Justice *Yates* held that this was a deviation, and a verdict was accordingly found for the underwriters.

Townson v. Guyon, before Lord Mansfield.

In another case, an action was brought upon a policy on goods and other merchandizes, loaded on board the ship called the *Charming Nancy*, from *Dunkirk* to *Leghorn*. The ship came to *Dover* in her way to procure a *Mediterranean* pass; and was afterwards lost.

Lord *Mansfield* was of opinion, that the calling at *Dover* was a deviation; and the plaintiff was nonsuited.

It was also held by Lord Chief Justice *Lee*, that if the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation, and discharges the insurer. But the time which a ship is detained in the port for necessary repairs, the insurance being *at and from*, shall not be considered *unnecessary delay* so as to avoid the policy. Lord *Kenyon* said, the policy attached on the ship while she was undergoing repairs; it was in such a case not necessary that she should be fit to proceed on the voyage at the time of the insurance. The underwriter took into his consideration the time she might be necessarily detained.

Smith v. Surridge, 4 Esp. 25.

It has also been held that even where there is a permission given to *touch and stay at* a place, that confers no privilege on the assured to *break bulk*, or to unload any part of the cargo. The case which was so decided was an insurance on goods at and from *Whitehaven* to *St. Michael's*, with liberty to touch and stay at any place or places whatsoever, and *particularly at Cork in her passage out*. The ship was driven by stress of weather *into Dublin*, and there she unloaded a great part of the coals, of which her cargo consisted, and then proceeded on her voyage and was lost.

Stitt v Wardel, Sittings at Guildhall after Mich. 1797.

Lord *Kenyon*, C. J. was of opinion that as the liberty given was only to *touch and stay*, but not *to trade*, the unloading and selling the coals, though the ship was not further delayed thereby, was a *breaking bulk*, and avoided the policy: and upon being asked by the plaintiff's counsel, his lordship said, he should have been of the same opinion, if this *breaking bulk* had happened at *Cork*; and the plaintiff was nonsuited.

So

So a veſſel having liberty *to diſcharge* goods at *Liſbon*, is not at liberty *to take in* any there, although there be a return of premium if ſhe ſails thence with convoy, and only waits till convoy is ready. Sheriff v. Potts. Sit. after M.T. 1803.

The two caſes upon this ſubject juſt referred to, though the deciſions of two moſt eminent judges, were never brought under the review of the Court. But in a ſubſequent caſe they were very conſiderably ſhaken, although in the caſe about to be quoted, the inſurance was upon *ſhip and freight*, and not upon *goods*; and Lord *Ellenborough* expreſsly reſerved his opinion upon any caſe of inſurance *on goods* till the point ſhould ariſe. In the caſe now to be mentioned, which was an inſurance at and from the ſhip's loading ports on the coaſt of *Spain* to *London*, with liberty to touch and ſtay at any port or place whatſoever, the jury found expreſsly, that the going into, and ſtaying at *Gibraltar* was of neceſſity, in order to procure a ſupply of proviſions, and that the ſtay was not longer than the neceſſity required: and it was proved that, while the veſſel lay there, the captain received on board ſome cheſts of dollars. This fact, and this finding of the jury raiſed the queſtion of law, whether the taking in the additional cargo of dollars was a breaking of bulk in the courſe of the voyage, at a place *where there was no liberty to trade given* by the policy, ſo as to avoid it, as increaſing, or having a tendency to increaſe the riſk. The point was very fully argued; and the counſel, who argued that this amounted to a deviation, relied on the two caſes laſt quoted. Raine v. Bell, 9 East, 195.

But the Court were unanimous in deciding, (and they delivered their opinions *ſeriatim*,) that as the jury had found that the whole period of the ſhip's ſtay was covered by the neceſſity which originally induced her to go into *Gibraltar*, there was no implied warranty in ſuch a policy that the ſhip ſhall not trade, ſo as no delay be actually occaſioned. And as to the temptation to deviate held out to the maſter, that muſt always be a queſtion for the jury, as in other caſes of fraud, whether the deviation or delay aroſe from the trading or from neceſſity: and an *intention* to deviate, not carried into effect, will not avoid a policy, ſtill leſs can a *temptation* to deviate avoid it.

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The next case to be reported underwent a variety of discussion in the several courts in *Scotland*; and in all of them judgment was given against the underwriters: but upon an Appeal to the House of Lords, the various decrees of the courts below were reversed, agreeably to those principles adduced in the beginning of this chapter, and which have been uniformly admitted as found law.

Elliot and others v. Wilson and Co. 7 Bro. Parl. Cases, P. 459.

The harbour of *Carron*, situate near the head of the *Frith* of *Forth*, is chiefly resorted to by ships in the service of the *Carron* Company, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the Company, their coals, and such goods as may be offered them on freight, sail periodically for *Hull*, and other places on the *Eastern* coast of *England*. This is a coasting or carrying trade, the vessels in going down the *Frith* touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly it is usual for these vessels to call at *Borrowstownes* and *Leith*, and at *Morrison's Haven*, a port six miles farther down the *Frith*, and on the same side with *Leith* in the bay of *Prestonpans*. In *February* 1774, the respondents had occasion to ship fourteen hogsheads of tobacco on board one of these vessels for *Hull*; and desiring to insure them, gave the following instructions in writing to *Hamilton* and *Bogle*, insurance brokers in *Glasgow*: "Please to insure for our account by the "*Kingston*, *George Finlay*, master, from *Carron* to *Hull*, *with* "*liberty to call as usual*, fourteen hogsheads of tobacco;" and these instructions were entered in the brokers' books for the perusal of the underwriters, as is the practice at *Glasgow*. Upon the 9th of *February*, the appellants underwrote a policy of insurance in these terms: "beginning the adventure of the said to- "bacco, at and from the loading thereof on board the said ship "*Kingston* at *Carron* wharf, and to continue and endure until "said *Kingston* (*being allowed a liberty to call at Leith*) shall ar- "rive at *Hull*, and there be safely delivered." The respondents were not privy to the allowance to call at *Leith*, being thus substituted in the policy for the more general term, *as usual*, mentioned in the instructions to the broker. The premium agreed on was 1*l.* 5*s. per cent.* a rate equal, at least, if not higher, than

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was usual to be given in the voyage, in cases where it was understood, or expressed in the policy, that the vessel might touch at the customary ports. And in particular some of these appellants in *February* 1772, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at *Leith* and *Morrison's Haven*, at a premium of one *per cent.* only. The vessel thus insured had sailed from *Carron* five days before the date of the policy, that is, on the 4th of *February* 1774, it did not call or touch at *Leith, but put into Morrison's Haven:* set sail from thence on the 9th, got safe into the direct course from *Carron* to *Hull*, cleared the *Frith* of *Forth*, and proceeded with a fair wind, till on the evening of the 10th the vessel, being overtaken by a storm at *Holy Island*, on the coast of *Northumberland*, was wrecked and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants, that the ship received the smallest damage in going into or coming out of *Morrison's Haven.* Intelligence of this misfortune reached *Glasgow* on the 14th of *February*, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker, in whose hands it remained. It did not, however, occur to them, that this slight variation would afford a pretext to the underwriters for refusing payment: nor does it seem to have then occurred to those gentlemen, who wrote immediately to the respondents, desiring they would request the *Carron* Company to give the necessary orders for preserving the tobacco, and forwarding it to *Hull*, promising to contribute towards the expence, so far as they were interested. Upon the 24th of *February*, however, the appellants, in an instrument drawn by a publick notary, protested against the ship's having gone into *Morrison's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith;* and absolutely refused payment of the loss. On this refusal, the respondents brought their action against the appellants in the court of admiralty in *Scotland*, the only competent court for determining questions about insurances, and other maritime affairs in that country, in the first instance. The appellants put in their defence, which was followed by other pleadings, in *January* 1775, the Judge Admiral pronounced the following interlocutor (or decree): "Having considered the whole circumstances of this "case, and in particular that it is not alleged by the defenders, "that the pursuers were in the knowledge of the ship the *King-*

"*ston*

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" *Ston* being intended to put into *Morrison's Haven*, he repels the " defence pleaded by the defenders." The appellants reclaimed againſt this interlocutor (petitioned for a review of the ſentence), and anſwers being put in to their petition, the Judge Admiral, becauſe they ſet forth, and ſeemed to found on converſations between them and the brokers, at the time of underwriting or ſettling the terms of the policy, allowed them to bring proof of what paſſed at and previous to making the inſurance. But the appellants preſented a ſecond petition, declining to go into any proof, inſiſting that the cauſe turned ſingly upon the words of the policy, and demanding judgment on the abſtract queſtion, whether the veſſel touching at *Morriſon's Haven*, when not allowed by the policy, diſcharged the underwriters? whereupon the Judge again decreed in favour of the reſpondents. The appellants then ſued out a writ of ſuſpenſion from the Court of Seſſion, of theſe ſentences of the Judge Admiral; and after the uſual preliminary ſtep of procedure before the Lord Ordinary, the cauſe being reported to the whole bench of Lords, their Lordſhips having before them the opinions of ſeveral of the moſt eminent merchants both in *England* and *Scotland*, gave judgment for the reſpondents, in the month of *January* 1776, in the following terms: " Having adviſed informations, *hinc*, *inde*, and " conſidered the policy of inſurance and the whole circum- " ſtances of the caſe, the Lords repel the reaſons of ſuſpenſion, " find the letters orderly proceeded," (that is, that the appellants were obliged to pay the ſums underwritten, in terms of the Judge Admiral's decree,) " and their Lordſhips decree accord- " ingly." The appellants having alſo reclaimed againſt this interlocutor, it was, in *March* 1776, finally confirmed. From theſe ſeveral decrees the preſent appeal was brought; and the Houſe of Lords were of opinion, that a wilful deviation from the due courſe of the inſured voyage, is in all caſes a determination of the policy; that, from that moment, the engagement between the inſurers and inſured is at an end; that it is immaterial from what cauſe, or at what place, a ſubſequent loſs ariſes, the inſurers being in no caſe anſwerable for it: that the going into *Morriſon's Haven* was a wilful deviation from the due courſe of a voyage from *Carron* to *Hull*: that though it may be true, as contended on the part of the reſpondents, that ſhips ſailing through the *Frith* of *Forth* have ſometimes been permitted by the terms of a policy, underwritten at the ſame premium as the

preſent, to go into that port, it could not avail in the preſent caſe, ſince the policy in queſtion had given no ſuch permiſſion. It was therefore ORDERED AND ADJUDGED that the interlocutors complained of ſhould be reverſed.

In a late caſe upon a policy of inſurance on a ſhip "*at and from Fiſherow to Gottenburgh, and back to Leith and Cockenzie,*" it appeared that in the homeward voyage ſhe went *firſt* to *Cockenzie*, which lay nearer to *Gottenburgh* than *Leith*, and was ſtranded in the harbour of *Cockenzie*. There was a good deal of evidence given to ſhew that *Leith* harbour was the ſafer of the two; but the jury ſeemed to be of opinion, according to a note taken by Lord *Kenyon* at the time, that the conſtruction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by conſent of parties, to ſave the expence of going to trial again, found a verdict for the plaintiff, with permiſſion to enter a verdict for the defendant, if the court ſhould agree that the above conſtruction was the true one. The caſe came on to be diſcuſſed in court; and they were of opinion, that unleſs there be ſome uſage proved, or ſome ſpecial facts to vary the general rule, the party inſured muſt go to the ſeveral places mentioned in the policy, in the order in which they are named; and that to depart from that courſe is a deviation: and one of the Judges added, that the parties by inſerting the names contrary to the *natural* order of the places, ſhewed it to have been the intention of the parties to vary the natural courſe of the voyage. A verdict was entered for the defendant. Batſon v. Haworth. 6 Term Rep. 531.

In the argument of the preceding caſe, another was quoted by one of the learned Judges, as having been decided before Lord Chief Juſtice *Lee*, where in an inſurance on the *Gothic Lyon at and from London to her ports of diſcharge in the Streights as high as Meſſina*, his Lordſhip was of opinion, as ſhe did not ſtop at *Marſeilles* (for which place ſhe had a cargo) in her way to the Streights, but meant to take it in her return, that this was acting contrary to the terms of the policy: for by her ports of diſcharge, muſt be underſtood ſuch ports as it was intended goods ſhould be delivered at, and the firſt of theſe was *Marſeilles*. Claſon v. Simmond, at Guildhall, Hil. Sittings 1741.

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So in a very late case, where a ship was insured "at and from "*Lisbon* to a port in *England*, *with liberty to call at any one port* "*in Portugal* for any purpose whatever: and where the ship had sailed from *Lisbon* to *Faro* to complete her loading, *Faro* being a port to the southward of *Lisbon*; consequently lying directly out of the course of the voyage to *England*: Lord *Kenyon* was of opinion that the liberty, given by this policy, must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England*; and that by going to the southward the assured had been guilty of a deviation.

Hogg. v. Horner, Sitt. at Guildhall after Mich. Term, 1797.

These cases seem clearly to have decided that where several *termini* are mentioned in a policy of insurance, as the objects of the assured, those ports must be gone to in the order in which they are mentioned in the policy, otherwise the assured will be guilty of a deviation. But it was lately endeavoured to apply the principle of those cases to one, which it was considered by the court, did not interfere with those previously before them for judgment.

It was an action on a policy on goods on board *the Franklyn*, *at and from Liverpool to Palermo*, *Messina*, *Naples*, *and Leghorn* The ship took in goods and was cleared out for *Naples* only, and had no goods on board for any other place, *Leghorn* being known to be in the hands of the *French* soon after the policy was effected. The ship was captured in the Bay of *Biscay* by the *French*, and consequently before the dividing point, to any of the places mentioned in the policy. The plaintiff recovered a verdict. A new trial was moved for on two grounds, one of which only is material here, namely, that there was no inception of the voyage insured, which was to *Palermo*, *Messina*, and *Naples*, in the order in which they stand in the policy, as in *Beatson* v. *Haworth*: whereas here it appeared that the vessel never intended to go to *Palermo* or *Messina*, but only to *Naples* for which place she took in her loading and cleared out.

Marsden v. Reid. 3 East's R. 572.

Supra 393.

Lord *Ellenborough* said, "This is not a question of deviation; to raise which, it must be assumed that the voyage insured was commenced, and that the ship afterwards went out of her track, on that voyage; but there is no question of that sort here; the loss

loſs happened before the dividing point, to any of the places named in the policy: the only queſtion is, whether there were any inception of the voyage inſured? and I am clear that there was. I think that the voyage inſured to *Palermo*, *Meſſina*, and *Naples*, *meant a voyage to all, or any of the places named*; with this reſerve only, that if the veſſel went to more than one place ſhe muſt viſit them in the order deſcribed in the policy. The aſſured muſt only not invert the order of the places, as they ſtand in the policy. And that was in truth all that was decided in the caſe of *Beatſon* v. *Haworth*; where it muſt be remembered that the veſſel had taken in goods for both the places named, *Leith* and *Cockenzie*, and it was aſſumed that ſhe put into *Cockenzie*, firſt, in her way to *Leith*, where ſhe was to diſcharge the reſt of her cargo.

Mr. Juſtice *Lawrence*.—Why are we to ſuppoſe that the underwriters meant to ſtipulate that at all events the ſhip ſhould take the *circuitous* inſtead of the *direct* courſe? Is it not rather to be preſumed, that if the queſtion had been put to the underwriters, whether they meant to inſiſt that the ſhip ſhould go round by each of the places named to *Naples*, they would have anſwered in the negative, becauſe, if ſhe went the direct courſe to *Naples*, it would leſſen their riſk. It is admitted at the bar, that if the ſhip had cleared out for the firſt place named in the policy, the riſk would have commenced, although there had been no intention of proſecuting the voyage further. Then there is an end of the objection, that the voyage commenced is not identified with the voyage inſured. And *Beatſon* v. *Haworth* only decided that if the ſhip go to more than one of ſeveral places named in the policy, ſhe muſt take them in the order in which they ſtand. The two other judges concurred.

Theſe principles being once eſtabliſhed, it follows, as a neceſſary conſequence, that however ſhort the time of deviation may be, if only for a ſingle night, or even for an hour, the underwriter is equally diſcharged, as if there had been a deviation for weeks or months; for the condition being once broken, no ſubſequent act can ever make it good.

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Cock v. Townſon, C. B. before Ld. Camden, Ch. Juſt.

The ſhip *George* was bound from *Cork* to *Jamaica* with a convoy in the courſe of a war: the captain, in concert with two other veſſels, took advantage of the night, and being ſhips of force, cruiſed, and thereby deviated out of the direct courſe of their voyage, in hopes of meeting with a prize. Lord *Camden* clearly held, and a ſpecial jury of merchants, agreeably to his directions, determined, that from the moment the *George* deſerted or deviated from the *direct voyage* to *Jamaica*, the policy was diſcharged.

In a modern caſe, however, it ſeemed to be the general opinion of Lord *Mansfield*, and a ſpecial jury, and was ſworn to be the uſage, by ſeveral witneſſes, that if a merchant ſhip carry letters of marque, ſhe may *chaſe* an enemy, though ſhe may not *cruiſe*, without being deemed guilty of a deviation.

Jolley v. Walker, at Guildhall, Eaſt Vac. 1781.

This was an inſurance on goods and the ſhip *Mary* from *London* to *Cork* and the *Weſt Indies*, and the ſhip was warranted to proceed on that voyage with 60 men, and equipped with 22 guns, 18 and 6 pound ſhot, and ſheathed with copper. The queſtion was, whether a ſhip having letters of marque could chaſe an enemy's ſhip without being ſaid to have deviated? The facts were that the ſhip ſailed with letters of marque on board againſt the *French*, *Spaniards*, and *Americans*, and was ordered not to cruiſe; but to proceed direct on her voyage to the *Weſt Indies*; but in the event of her meeting or coming within ſight of any ſhip belonging to the enemy, ſhe was to chaſe, take, and make prize of ſuch enemy's ſhip, if in her power. In the 26 *December* 1780, in latitude 14. 22 N. and longitude 40. 52 W. at midnight, a ſail was diſcovered, whereupon the *Mary* gave chace, and on ſuch veſſel's perceiving the *Mary*, ſhe hauled her wind to the northward, and the *Mary* hauled up after her, and at one o'clock loſt ſight of her; but the *Mary* ſtill ſtood to the northward, and at five A.M. ſaw ſuch veſſel again on the lee-bow two miles off. The chace was renewed, and at ſix A.M. the *Mary* came up within three-quarters of a mile of the veſſel, when ſhe hoiſted *Spaniſh* colours, and at half paſt ſeven the *Mary* came up within piſtol ſhot and began to engage, which engagement continued till ten o'clock, when the *Spaniſh* veſſel ſheered off, leaving the *Mary* much diſabled. She afterwards ſteered her courſe

to

to the weſtward and was taken on the 5th of *January* 1781, by an *American* privateer (*a*). It was agreed on all hands, that a ſhip, in ſuch circumſtances, might not cruiſe; and ſeveral witneſſes ſpoke to the uſage and practice of ſhips, which carried letters of marque, chaſing an enemy. It was admitted on the part of the inſurers, that if an enemy came in the way, the ſhip muſt defend or engage; but contended, that if the letter of marque loſt ſight of the enemy, that was no longer chaſing, but cruiſing. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

Where a merchant ſhip, employed in commercial objects, was inſured *with or without letters of marque*, with a liberty to *chaſe, capture, and man prizes*, the captain is not juſtified, after he has captured a veſſel, in the further proſecution of his voyage, *in ſhortening ſail and lying to*, in order to let the prize keep up with him, for the purpoſe of protecting her, *as a convoy* into port, in order to have her condemned, though ſuch port be within the voyage inſured; for that would be to extend the meaning beyond what the parties have themſelves expreſſed, by giving them leave *to convoy*, as well as to *chaſe, capture, and man*, which words alone extend the rights of the aſſured beyond the common terms of indemnity in the policy. Lawrence v. Sydebotham. 6 East 45

But in another caſe, which was alſo the caſe of an inſurance on a commercial adventure, at and from *Liverpool* to *Africa*, &c. *with or without letters of marque*, it became a queſtion, whether thoſe words enabled the ſhip to *chaſe* for the purpoſe of hoſtile attack and capture, all veſſels whenſoever or whereſoever deſcried, provided the original purſuit commences from a point in the courſe of the voyage, without ſuſpending or ſuperſeding wholly the objects, deſtination and limits of the commercial adventure deſcribed in the policy: or whether they are to be confined to a leave to employ force for the purpoſe of *defence* (including a liberty of attack and chace,) only ſo far as they may fairly be ſuppoſed to promote ultimate ſecurity. The court were of opinion that the caſe of *Jolly* v. *Walker* did not afford any con- Parr v. Anderſon. 6 East 202.

(*a*) The facts of this caſe are now more accurately ſtated than they were in former editions, as they were communicated by Lord *Ellenborough* to the court, from the original brief, which he had obtained, when he delivered his opinion in *Parr* v. *Anderſon*.

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ſtruction of a policy containing the liberty in queſtion, inaſmuch as that policy contained no ſuch liberty. Therefore in the abſence of any determination on the effect of ſuch words, the court ſent the caſe to a ſecond trial, in order to aſcertain, as a queſtion of fact, in what manner the parties to ſuch contracts have acted upon them in former inſtances, by paying loſſes, where deviations of the kind now in queſtion have happened; and whether they have as yet obtained in uſe and practice, as between aſſured and aſſurers, any and what known and definite import.

Guildhall, March 6, 1805.

This caſe came on to be tried again before Lord *Ellenborough* and a ſpecial jury. From my memory of what paſſed, having been one of the counſel in it, aided by a note which I have ſeen, his Lordſhip was ſtrongly of opinion on the evidence, that this veſſel had cruized, which of courſe, if the jury ſo thought, would put an end to the queſtion. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witneſſes.

Farrat v. Ward. v Campbell, N. P. 263.

Conſiſtently with this principle, that the court will not extend the meaning of a licence beyond what the parties have themſelves expreſſed, where leave was granted by the policy to a merchant ſhip engaged on a fiſhing voyage to *cruiſe for, chaſe, capture, man, and ſee into port any ſhip or ſhips of enemies*, Lord *Ellenborough* was of opinion that ſuch a permiſſion did not authorize the ſhip to remain in port till a prize receives neceſſary repair, which ſhe could not have had otherwiſe: at moſt ſhe might have entered the port with the prize, ſeen her ſafely moored, and perhaps have ſtopped a reaſonable time to give directions for proceeding on the final deſtination. For if the captor were permitted to ſtay till the prize was repaired, the voyage might never terminate, for on leaving *St. Catharine's* (the port to which this prize had been carried) another prize might have been taken, ſtanding equally in want of repairs; afterwards a third, and ſo on in an infinite ſeries. This therefore, ſaid Lord *Ellenborough*, turns out to be a riſk, which the defendant did not underwrite.

Moſs v. Byrom. 6 Term R. 379. ante, p. 120.

In a caſe which came before the Court of King's Bench upon a motion for a new trial, the Judges were unanimouſly of opinion,

opinion, that if the assured, without the knowledge of the underwriters, take out a letter of marque (but without a certificate, which by the prize act of the 33 *Geo.* III. ch. 66. s. 15. is absolutely necessary to its validity), for the purpose of inducing the seamen to enter, and without any intention of cruizing, this does not so essentially vary the risk as to avoid the policy.

The doctrine that a voluntary deviation from the voyage insured vitiates the policy, has been held to be applicable to an insurance upon *freight* as well as to an insurance upon ship and goods.

Thus in a case upon a policy of assurance *on freight* of the ship *Bethiah at and from Bourdeaux to Virginia*, warranted *American* ship and property: the declaration alleged that the ship was an *American* ship and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but upon the evidence it appeared that the goods, whether *American* or not, *were to be carried in the ship from Bourdeaux to Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to *Virginia*, and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured: plaintiff was nonsuited, and no application was made to set it aside.

Murdock v. Potts, Sitt. at Guildhall after Trin. T. 1795.

But though the consequences of a voluntary deviation are fatal to the validity of the contract of insurance, yet wherever the deviation arises from necessity, force, or any just cause, the underwriter still remains liable, although the course of the voyage is altered.

Roccus, Not. 52.

This rule is illustrated by the following case. The ship *Mediterranean* went out in the merchants' service with a letter of marque,

Elton v. Brogden, 2 Stra. 1264.

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marque, and bound from *Briſtol* to *Newfoundland*, inſured by the defendant. In her voyage ſhe took a prize, and returned with it to *Briſtol*, and received back a proportional part of the premium. Then another policy was made, and the ſhip ſet out, with expreſs orders from the owners, that if another prize was taken, the captain ſhould put ſome hands on board ſuch prize, and ſend her to *Briſtol*; but that the ſhip in queſtion ſhould proceed with the merchants' goods. Another prize was taken in the due courſe of the voyage, and the captain gave orders to ſome of the crew to carry her to *Briſtol*, and deſigned to go on to *Newfoundland*: but the crew oppoſed him, and inſiſted he ſhould go back, though he acquainted them with his orders; upon which he was forced to ſubmit, and on his return his own ſhip was taken, but the prize got in ſafe. And now in an action againſt the underwriters, it was inſiſted, that this was ſuch a deviation as diſcharged them. But the Court and jury held, that this was excuſed by the force upon the maſter, which he could not reſiſt; and therefore fell within the excuſe of neceſſity, which had always been allowed. So the plaintiff had a verdict for the ſum inſured.

Vide ante, p. 115.

Scott v. Thompſon, 1 New Rep. 181.

So alſo on a limited policy againſt *ſea-riſk and fire only*, in the courſe of the voyage inſured from *Liverpool* to *Amſterdam*, the ſhip was carried out of the courſe of the voyage into *Falmouth* by a king's ſhip, but being afterwards releaſed, ſhe proceeded towards her deſtination, and the cargo, which was the ſubject of the inſurance, ſuſtained ſea-damage, the underwriters were held liable; for the deviation, which was inſiſted on as matter of defence, was not voluntary: and deviation occaſioned by force, and deviation by neceſſity are the ſame; for neceſſity is force. The caſe of *Elton* v. *Brogden* was cited by the Lord Chief Juſtice (Sir *James Mansfield*), and alſo another caſe of *Driſcoll* v. *Paſſmore*, 1 *Boſ.* & *Pull.* 200 and 313. in the courſe of the argument.

Roccus, 52. Santer de Aſſecur. part 3. n. 52.

The general writers upon this ſubject have enumerated the various circumſtances, which will operate as a juſtification to the inſured, for leaving the direct tract of the voyage, upon the ground of neceſſity and reaſonable cauſe: ſuch as to repair his veſſel, to eſcape from an impending ſtorm, or to void an enemy. In our reports of deciſions in the *Engliſh* courts of juſtice, we find

find instances of all these various excuses being allowed as sufficient to justify a deviation; and also another species of excuse, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I shall rank all the cases, which apply to this branch of our enquiry, under these several divisions.

The first ground of necessity which justifies a deviation, is that of going into port to repair. If a ship is decayed, and goes to the nearest place to refit, it is no deviation; because it is for the general interest of all concerned, and consequently for that of the underwriters, that the ship should be put in a proper condition capable of performing the voyage.

Motteux and others v. the London Assur. Comp. 1 Atk. 545.

The ship *Eyles*, being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to insure this ship in the *London* Insurance Office for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the said ship should arrive at *London*; and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England*; but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ships, *&c. she sailed for Bengal to be refitted*; and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee Sands*, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ship went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provisions, and ballast. When this cause came on to be heard before Lord Chancellor *Hardwicke*, he refused to decide it, but directed an issue at law. His Lordship, however, observed, that the general principles laid down by the plaintiff's counsel were right, as stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition: and in such a case, if she went to the nearest place, he should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity

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ceſſity of the ſhip's being repaired; but there is not a ſyllable of proof why ſhe might not have been equally repaired at *Fort St. George*. His Lordſhip, therefore, directed an iſſue to try, whether the loſs in *July* 1733, was a loſs during the voyage, and according to the adventure which was agreed upon, or intended to be inſured. On a trial at *Guildhall*, in the Court of Common Pleas, the jury found in favour of the plaintiffs.

Guibert v. Readſhaw, Sitt. in Lond. Hil. Vac. 1781.

This was an action on a policy of inſurance on the *Nancy*, at and from *La Rochelle* to the coaſt of *Africa*, during her ſtay and trade there, and at and from thence to her port of diſcharge in the iſland of *St. Domingo*. Three days after the ſhip ſailed from *La Rochelle*, ſhe met with a gale, which ſtrained her ſeams, and ſplit her mizen-yard and rigging. The crew came in a body to the captain, deſiring for the preſervation of their lives to make to ſome port to repair. The veſſel being a new one, and the captain finding that ſhe had too little ballaſt, complied, and put into *Liſbon*, the neareſt port; from whence, after taking in 500 rolls of tobacco as ballaſt, he proceeded to the coaſt of *Guinea*, traded there, and the ſhip was afterwards captured in the ſight of *St. Domingo* before ſhe arrived. The defendant inſiſted, that going into *Liſbon* was a deviation, and called witneſſes, who were of opinion, that in the latitude in which the ſtorm happened, there could be no difficulty in repairing all the damage the veſſel was deſcribed to have received, even in the worſt weather, as ſhe might have proceeded to the coaſt of *Africa*, and repaired there at a leſs expence; and that a ſhip, loaded like that in queſtion, could not need additional ballaſt. On the croſs-examination, it came out that the premium would not have varied had the voyage been by the way of *Liſbon*.

Lord *Mansfield* left it to the jury, on the ground of neceſſity to go to *Liſbon* for repairs. He ſaid, that much depended upon the circumſtance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witneſſes, they muſt find for the plaintiff, for that the whole of the defendant's caſe reſted merely upon ſurmiſe and ſuſpicions alone. The plaintiff accordingly had a verdict.

The next excuſe for leaving the direct courſe is ſtreſs of weather. Upon this point the rule is this, that wherever a ſhip is

in order to eſcape a ſtorm, goes out of the direct courſe; or when in the due courſe of the voyage, is driven out of it by ſtreſs of weather, this is no deviation; becauſe it was occaſioned by the act of God, which, by a maxim of law, is ſaid to work an injury to no man. It has alſo been held, that if a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven. This rule is exemplified by the following caſe.

In an action on a policy of inſurance of the ſhip *Atlantic*, warranted to ſail with convoy from *England* to *St. Kitt*'s on or before the firſt of *Auguſt*; the queſtion was, Whether there had been a deviation? The ſhip was ſeparated from her convoy by a ſtorm. The captain being examined, ſaid, his object, after his ſeparation, invariably was to gain *St. Kitt*'s, or to fall in with the convoy. That the ſhip was taken by an *American* privateer in lat. 34. lon. 59. Several captains were examined, who ſwore, that they would have taken the ſame courſe to get to *St. Kitt*'s, or regain the fleet. Harrington v. Halkeld, Sitt. in Lond. Mich. Vac. 1778.

Lord *Mansfield*.—"The ſingle queſtion is, Whether the captain was taken as he was going to *St. Kitt*'s? If he was not, he is perjured. The account he gives is, that on the 28th of *July* there was a ſtorm, which ſeparated the fleet; that he did all he could to get to *St. Kitt*'s, and to direct his courſe ſo as to meet the convoy croſſing. The captain goes on the ground not to reaſon, but to obey, be the conſequence what it might. He knows nothing of the inſurance: he ſays to himſelf, If I obey, I am doing right. As to the proteſt, I do not ſee that it contradicts the captain's evidence. Other captains have looked at the log-book or journal; and they ſay, they would have held the ſame courſe."

Verdict for the plaintiff.

Upon the ſubject of a departure from the courſe of the voyage, on account of ſtreſs of weather, another very important point has been determined, though the ſame principle runs through all the caſes, that whatever happens by the act of God, ſhall not be imputed to man. On this ground it has been held, that if a ſhip

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ſhip be driven out of her port of loading by ſtreſs of weather into another, and then does the beſt ſhe can to get to her port of deſtination, it ſhall not be deemed a deviation, though ſhe do not return to the port from whence ſhe was driven.

Delaney v. Stoddart, 1 Term Rep. p. 22.

The caſe here alluded to was an action upon the caſe againſt the defendant, for not having inſured a ſhip and cargo, purſuant to the orders of the plaintiff, by means whereof he was damnified, the ſhip having been loſt (*a*) It was tried before Mr. Juſtice *Buller* at *Guildhall*, at the ſittings after *Trinity* Term 1785; and a verdict was found for the plaintiff.

Wilkinſon v. Coverdale, Sitt. in B.R. at Guildhall after Mich. Term, 34 Geo. III. 1 Eſp. Rep. 75.

(*a*) It may be proper to explain the nature of this action. When a man undertakes, either by an implied or expreſs promiſe, to do a thing for another, and he neglects to do it, or does it unſkilfully, the law gives the perſon injured an action for the negligence. This is the caſe in queſtion with reſpect to inſurance; and the only difference between this action, and that on a policy againſt the underwriters, is in point of form; for the plaintiff in this action is entitled to recover the exact ſum he ordered to be inſured: and the defendant is entitled to every benefit, of which the underwriter could have taken advantage, ſuch as fraud, deviation, non-compliance with warranty, &c.

Smith v. Laſcelles, 2 Term Rep. 187.

In a late caſe, the whole law upon this action was very fully and accurately ſtated by Mr. Juſtice *Buller*, and aſſented to by the whole Court; and upon this occaſion that learned judge mentioned the three inſtances in which ſuch an order to inſure muſt be obeyed, otherwiſe this action will lie. Firſt, where a merchant abroad has effects in the hands of his correſpondent here, he has a right to expect that he will obey an order to inſure, becauſe he is entitled to call his money out of the other's hands when and in what manner he pleaſes. The ſecond claſs of caſes is, where the merchant abroad has no effects in the hands of his correſpondent, yet if the courſe of dealing between them is ſuch, that the one has been uſed to ſend orders for inſurance, and the other to comply with them, the former has a right to expect that his orders for inſurance, will ſtill be obeyed, unleſs the latter give him notice to diſcontinue that courſe of dealing. Thirdly, If the merchant abroad ſend bills of lading to his correſpondent here, he may engraft on them an order to inſure, as the implied condition, on which the bills of lading ſhall be accepted, which the other muſt obey, if he accept them, for it is one entire tranſaction. For if the commiſſion from abroad conſiſt of two parts, the one to accept the bill of lading, the other to cauſe an inſurance to be made, the correſpondent cannot accept it in part, and reject it as to the reſt.

Wallace v. Tellfair, Sitt. after Trin. 1786, before Mr. Juſ. Buller. 2 Term Rep. 188. n. (*a*) Smith v. Cologan. 2 Term Rep. 188. n. (*a*) Niſi Prius before Mr. Juſ. Buller, Mich. 1787.

So alſo if a merchant here accept an order for inſurance, and limit the broker to too ſmall a premium, in conſequence of which no inſurance can be procured, he is liable to make good the loſs to his correſpondent.

But if a perſon, to whom ſuch orders are ſent, does what is uſual to get the inſurance made, that is ſufficient; becauſe he is no inſurer, and is not obliged to get inſurance at all events. Thus if he ſend to *Lloyd's*, and the underwriters refuſe to take the riſk at any premium; and he afterwards ſend to get inſurance done at *Newcaſtle*, he has done his duty, and can never afterwards be charged in this action, more eſpecially if the plaintiff adopt and approve his acts.

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Upon a motion for a new trial, the facts appeared to be these: The plaintiff, who lived at *St. Kitt*'s, wrote a letter to the defendant, dated the 30th of *April* 1781, informing him that he intended to purchase a ship, and offering the defendant a share. On the 4th of *May* 1781, he wrote a second letter to the defendant, acquainting him that he had purchased the ship, but had only a share in it himself, the residue being divided into three or four more shares, one of which he had reserved for the defendant, in case he should wish to be concerned; and directing an insurance upon the ship *at and from St. Kitt*'s *to London*, warranted to sail with convoy. On the 28th of *June*, the defendant wrote to the plaintiff, that he had no objection to a fourth, or a share equal to the plaintiff's. On the third of *July*, the plaintiff informed the defendant, that the ship had left the port to take in her cargo; that she let go an anchor at *Sandy Point*, but as the wind blew fresh, *she drove out and could not come in again; that she was obliged to go to Eustatius*, and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of *July*, wrote, that the *Friendship did all in her power to get up from St. Eustatius, but could not*, and therefore he sold her to Mr. *Ross* at *Eustatius*. I have already transcribed as much of the several letters as are material to the subject of this chapter; in addition to which the following facts appeared in evidence: That the ship *Friendship* had sailed from *St. Eustatius*, on the 1st of *August* with the convoy, and that she had afterwards foundered at sea; that *St. Eustatius* is in the direct road to *London* from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Eustatius*, to take up any ships that might be there; that if the *Friendship* had sailed from *St. Kitt*'s, she must have gone by *Eustatius*; but would not have stopped there: that when she was driven to *St. Eustatius*, *after making several efforts to get back to St. Kitt*'s to finish her loading, and finding she could not succeed, she then took in the rest of her loading at *St. Eustatius*.

At the trial, several grounds of defence were made; but the only one, material for our consideration was, that the remaining at *St. Eustatius*, and not going back to *St. Kitt*'s, was a deviation.

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tion. The learned judge, who tried the cauſe, was of opinion that it was not a deviation, being occaſioned by ſtreſs of weather. Upon this ground, amongſt others, the motion for a new trial was founded.

After argument at the bar,

Lord *Mansfield* ſaid, "The only material queſtion is, Whether there is a deviation in this caſe? and that depends on the evidence. If a ſtorm drive a ſhip out of her voyage into any port, and being there, ſhe does the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven; but here the witneſſes ſay, ſhe tried to get back to *St. Kitt*'s and could not: and it is a much eaſier navigation to go directly from *St. Euſtatius* to *London*, than to go back to *St. Kitt*'s firſt. And as to the taking in the cargo at *St. Euſtatius*, I do not find that the ſhip loſt any time by it. Every thing is the effect of the ſtorm, and occaſioned by it. This is the only point on which I had any doubt, and it required ſome conſideration. It was a queſtion, which was proper to be left to a jury, whether this was the ſame voyage or not, and they have determined it."

Mr. Juſtice *Willes* inclined to a different opinion.—"My only doubt is, whether it was the ſame voyage as that inſured. So far as the ſhip was driven by ſtreſs of weather, ſo far is there an exception. When ſhe is driven to *St. Euſtatius*, ſhe attempts to get back to *St. Kitt*'s; but I do not find that ſhe made any attempt to get to *London* at that time. When ſhe was at *St. Euſtatius*, the owner of the ſhip ſold her to *Roſs*, who loaded her afreſh with tobacco inſtead of ſugar, which was to have been her original cargo; ſo that there is a new cargo, a new owner, and a new voyage. In theſe caſes we lean very much to deviation. In a caſe lately determined in this court, it was held, that going to *Beaumaris*, though only a few leagues out of the way, was a deviation. It ſtrikes me as a caſe of ſome difficulty: perhaps the jury had not evidence enough laid before them, on which to determine; for there is nothing ſaid on the part of the defendant as to the uſual courſe of the voyage. The riſk was certainly increaſed by the ſhip's continuing at *St. Euſtatius* ſo long: for the inſurance, if good at all, was good all the time ſhe lay

lay by at *St. Euſtatius*; and ſhe might have continued there much longer. In my opinion, it is very well worth the re-conſideration of a jury."

Mr. Juſtice *Aſhhurſt*.—"This ought to be conſidered as the ſame voyage inſured. Wherever a ſhip is driven by ſtreſs of weather out of her own port into another, that ſhall not be conſidered as a deviation. Here the ſhip was forced by ſtreſs of weather to go to *St. Euſtatius*; and being there, ſhe endeavoured ſeveral times to get back to *St. Kitt*'s, but without effect. In fact it was better for the parties that the cargo ſhould be completed at *St. Euſtatius*; her continuing there, rather diminiſhes the riſk than otherwiſe; becauſe if ſhe had gone back to *St. Kitt*'s, it would have taken up a longer time. If then every thing was done, that could be done, under ſuch circumſtances, for the benefit of the adventure, this ſhall not vacate the policy.

Mr. Juſtice *Buller*.—"It has been much relied on in this caſe, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the queſtion and ſuppoſing the ſhip as not being ſold to *Roſs*, I will firſt conſider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence: neither is it true, that the veſſel afterwards purſued the ſame voyage by accident; for that part of the cargo, which ſhe took in at *St. Kitt*'s, continued on board of her the whole time, and the original intention of the ſhip's coming to *London* was likewiſe continued: the parties never thought of a different voyage. But it is ſaid, that ſhe took in another cargo at *St. Euſtatius*: what ſays the evidence? Where a captain has not taken in a full cargo, it is uſual to take in the reſt at *St. Euſtatius*: ſuch was proved to be the cuſtom of the voyage: and it was proved, that on a *voluntary* act of the captain's going to *St. Euſtatius*, the policy would have protected the ſhip's ſtay there; *à fortiori* it will, when the ſhip was driven there by ſtreſs of weather. As to the defendant's not being prepared at the trial to anſwer the uſage, he ought to have come prepared with that, which was the gift of his defence. Then was the riſk altered? had it been ſo, it was in the defendant's power to have proved it; but there was no proof that it was altered; part of the ſame cargo continues; nor does it appear that they meant to alter the cargo, for ſhe endeavoured to get

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back to *St. Kitt*'s to take in the reſt; but was prevented by ſtorms. I think the riſk would in reality have been much greater if ſhe had gone back; for ſhe muſt have come by the way of *St. Euſtatius* again in her paſſage home. The part of her cargo, which was taken in at the time the ſhip was driven from *St. Kitt*'s, has already been paid for by the defendant; even this would not have been paid for by the defendant, if he had conceived that the voyage had been at an end." The learned judges therefore, except Mr. Juſtice *Willes*, after giving their opinions upon the other points in the cauſe, ordered the rule for a new trial to be diſcharged.

But wherever the excuſe of neceſſity is ſet up, whether as ariſing from the act of God, or from any other cauſe, it muſt ſatisfactorily appear that every proper precaution was previouſly uſed by the aſſured, and that there was no default on his part, otherwiſe the plea of neceſſity ſhall not be admitted. The caſe in which this doctrine was advanced, was tried before Lord Chancellor *Eldon*, when Chief Juſtice of the Court of Common Pleas. The inſurance was from *Altona* to *Surinam*. The defence was deviation, the veſſel having put into *Plymouth*, out of the courſe of the voyage, and remained there 14 days. The anſwer on the part of the plaintiff to this defence was: that the captain was taken ill with a ſevere fit of the gravel, and that the mate having pricked his finger, by accident, his hand and arm ſwelled to ſuch a degree, as to render him incapable of doing his duty, and that they had put into *Plymouth* for the purpoſe of procuring medical aſſiſtance. Theſe facts, as to the captain's and mate's illneſs, and their application to a ſurgeon, were proved: but it alſo appeared, on croſs examination, that the ſurgeon of the ſhip was unprovided with proper inſtruments and medicines. He was not called.

Wolfe v. Claggen, 3 Eſp. 257.

Lord *Eldon* ſaid, he was of opinion that if by the viſitation of God ſo many of the crew, who would otherwiſe have been ſufficient, became ſo afflicted with ſickneſs, as to be incapable of navigating the ſhip, ſuch an illneſs of the crew was a neceſſity which might juſtify a deviation: but when it was ſet up as a juſtification of a deviation, he thought it incumbent on the plaintiff to ſhew that he had ſo far provided againſt ſuch events, by every proper precaution, ſuch as having medicines for

for the voyage, as much as he was bound with reſpect to the tightneſs of the ſhip. It was in evidence that a ſurgeon was neceſſary in ſuch voyages: if therefore ſickneſs was to be ſet up as an excuſe for deviation, the plaintiff ſhould ſhew that the ſurgeon was provided with ſuch medicines and inſtruments as would probably become neceſſary in the courſe of the voyage, to meet the common caſualties of the mariners. He was alſo of opinion, that the neceſſity for going into port ought to be made out by the plaintiff beyond all poſſibility of doubt, and that it aroſe and exiſted without any default of the maſter or party inſuring: and if they came in for medical aid, he ſhould expect medical men to be called to prove that ſuch neceſſity exiſted. That had not been done in the caſe then before him, and the plaintiff muſt be nonſuited.

A deviation may alſo be juſtified, if done to avoid an enemy, or ſeek for convoy; becauſe it is in truth no deviation to go out of the conrſe of a voyage, in order to avoid danger, or to obtain a protection againſt it.

In an action upon a policy, which was to inſure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy; the caſe was this, the *Galley* ſet ſail from *Bremen*, under the convoy of a *Dutch* man of war to the *Elb*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an admiral. After a ſtay of nine weeks, they ſet out from the *Texel*, and the *Galley* was ſeparated in a ſtorm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* ſalvage. Bond v. Gonſales, 2 Salk. 445.

It was ruled by Lord Chief Juſtice *Holt*, that the voyage ought to be according to uſage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*. And the plaintiff had a verdict.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*; and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her Gordon v. Morley. Campbell v. Boidieu, 2 Stra. 1265.

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her way thither. The insurers insisted that this being the time of a *French* war, the ship should not have ventured through the Channel, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose.

But Lord Chief Justice *Lee* held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Cowp. Rep. 601.

In the case of *Bond* against *Nutt*, in which the material question was, whether a warranty had or had not been complied with, and which consequently will be fully stated in the following chapter, the point of deviation for the purpose of procuring convoy also came under the consideration of the court. Upon that occasion Lord *Mansfield* and the whole court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Enderby and another v. Fletcher, Sittings in Lond. Trin. Vac. 1780.

And in a more modern case, the only question was, Whether there was a deviation or not? Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books we sometimes meet with cases, which say, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade, it is customary to stop at certain places, lying out of the direct course from *A.* to *B.* it is not a deviation to stop there; because it is a part of the voyage. There is no deception upon the insurer; because he is bound to take notice of the usages of trade; they are notorious to all the world; and when the

the uſage has declared it lawful in a ſpecifick voyage to go to any place, though out of the immediate track, it is as much a part of the contract of inſurance between the parties, as if it had been particularly mentioned. But in order to juſtify the captain of a ſhip in quitting the ſtraight and direct line from the port of loading to that of delivery, there muſt be a preciſe, clear, and eſtabliſhed uſage upon the ſubject, not depending merely upon one or two looſe and vague inſtances.

Where a ſhip was inſured from *Liverpool* to *Jamaica*, and had put into the *Iſle of Man*; it appeared that there were *ſome inſtances* of the *Liverpool* ſhips putting in there, but it was not the ſettled, common, eſtabliſhed, and direct uſage of the voyage and trade: it was therefore held a deviation, and the underwriters were diſcharged from any loſs that happened ſubſequent to the deviation. Saliſbury v. Townſon.

Having thus mentioned all the caſes to be found in the books of reports, which operate as an excuſe for a departure from the due courſe of the voyage, and which prevent thoſe effects, which always follow a deviation, namely, the diſcharge of the inſurer from his contract; it will be proper to obſerve, that it is not meant to inſinuate that other circumſtances may not frequently happen, which will have preciſely the ſame conſequences. For wherever a ſhip does that which is for the general benefit of all parties concerned, the act is as much within the intention and ſpirit of the policy, and conſequently as much protected by it, as if expreſſed in terms. And therefore in all caſes, in order to determine whether a diverſion from the direct courſe of the voyage is ſuch a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment. Cowper 60 1.

If any of the circumſtances above ſtated do really and *bonâ fide* occur, ſo as to render a deviation abſolutely neceſſary, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. Becauſe a voyage ſuperadded by neceſſity, ought to be ſubject to the ſame qualifications, and entitled only to the ſame ſort of latitude as the original voyage, it having become by operation of law, a part, as it were, of that original voyage.

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Lavabre v. Walter, Dougl. 284.

This was laid down as law by the Court of King's Bench in a case, in which the voyage insured was described in these words: "At and from *Port L'Oirent* to *Pondicherry*, *Madrass*, "and *China*, and at and from thence back to the ship's port, or "ports of discharge in *France*, with liberty to touch, in the out- "ward or homeward-bound voyage, at the isles of *France* and "*Bourbon*, and at all or any other ports or places, what or "whereseever: and it shall be lawful for the said ship, *in this* "*voyage* to proceed and to sail to, and touch and stay at any ports "or places whatsoever, as well on this side, as on the other side, "the *Cape of Good Hope*, without being deemed a deviation." The ship did not sail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *August* following, when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter, and undergone very considerable repairs, she sailed from thence early in the year 1778 (being the second ship that left the *Ganges*), returned to *Pondicherry*; and, after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is six or seven days, but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off, *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places. The plaintiffs rested their case chiefly on this ground, that the voyage to *Bengal* was adopted by necessity for the safety of the ship, upon the *bonâ fide* opinion of the captain, and the rest of the officers, and of one *Berard* the supercargo, who had the principal management. To prove this necessity it was sworn by *Berard* and four mates, that the ship had been detained longer in *Europe* than at first was foreseen, and that she met with extremely bad weather on her outward passage; and at *Pondicherry* was so leaky, that it appeared to them, that she must be careened, which could only be done at *Bengal*, there being no other place so near, to which she could proceed with safety, where that operation could be performed; for that no harbour between *Pondicherry* and the *Ganges* on the one side, and *Pondicherry* and *Bombay* on the other, would admit of so large a vessel being hove down, her burthen being near 800 tons. Indeed it turned out

when they got to *Bengal*, that ſhe could be repaired without careening, but this was only diſcovered, they ſaid, after ſhe was unloaded of much more of her contents than could have been done with ſafety in the open road of *Pondicherry*. All the witneſſes for the plaintiffs ſwore that they took the reſolution of going to *Bengal* much againſt their inclination; for that it would have been not only more for the advantage of the owners, but alſo more for their private intereſt as individuals, to go to *China*, they having prepared their own adventures for that market. Beſides the circumſtances of the leak, they aſſigned an additional reaſon for relinquiſhing the voyage to *China*, *viz.* that they had been ſo long detained at *Pondicherry*, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the *China* voyage with any degree of prudence or ſafety; and they ſaid *Bengal* was the beſt place they could go to, in order to winter. The defence ſet up was; 1ſt, That the ſhip had never ſailed on the voyage inſured, her deſtination, *when ſhe left Europe*, having been for *Bengal*, and not for *China*. 2d, That ſuppoſing her to have ſailed on the voyage deſcribed in the policy, yet her going from *Pondicherry* to *Bengal*, inſtead of proceeding to *China*, was a deviation, and was not juſtified by neceſſity. In ſupport of the firſt ground of defence, certain ſecret inſtructions were relied upon which were found on board the ſhip, and were addreſſed by the owner at *L'Orient* to *Berard* the ſupercargo, and which, though obſcurely penned, gave great room to contend, either that, at her departure, it had been reſolved to ſubſtitute the *Bengal* for the *China* voyage, or, at leaſt, that the alternative was left with *Berard*, to be decided one way or the other, according to certain events in *India*, which events turned out in the ſort of way that, according to the inſtructions, was to determine the voyage for *Bengal*. On the ſecond ground, it was ſaid, that from the plaintiff's own witneſſes, there was no neceſſity for going to *Bengal*; and that inſtead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a ſtrong preſumption that trading, and not the leak, or lateneſs of the ſeaſon, was the object of going to *Bengal*. On the part of the defence alſo, ſeveral letters were read (written by the owners to their correſpondents who had got their policy underwritten) to raiſe a preſumption that the neceſſity of going to *Bengal*, was merely a pretence deviſed after the capture; and

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Vide ante, c. 2.

when the insured began to apprehend that the words of the policy would not cover a voyage to that place. This is the substance of the evidence given in this, and two other causes upon the same ship, though not on the same policy: in addition to which in the present case, the secret instructions given to *Berard* had been more attentively perused, and afforded stronger reasons than they at first seemed to do, that the voyage to *Bengal* was pre-determined before the departure from *L'Orient*. The plaintiff's witnesses were much pressed, on this occasion, to say whether the lateness of the season alone was such as, independent of the leak, would have determined them to abandon the *China* voyage; and on the other hand, whether the leak, independent of the other reason, would, in their opinion, have rendered it necessary so to do. To this they said, they could not give a certain answer; for that as neither of the cases had happened, they had not exercised their judgment upon them.

Lord *Mansfield* summed up very strongly against the plaintiffs, on the head of fraud. But, independent of that ground, he stated a new point against them, namely, that if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that of *China*, *still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner: and that the delay in going from Pondicherry to Bengal, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage.*

Notwithstanding this direction, the jury found a verdict for the plaintiffs. Upon a motion for a new trial, after argument at the bar, the opinion of the Court of King's Bench was delivered by

Lord *Mansfield*.—"If this application were made upon the ground of impeaching the testimony of the plaintiff's witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill decided. The question is, Whether, without imputation on any body, circumstances have

not

not happened to take the voyage out of the policy? A deviation from neceſſity muſt be juſtified, both as to ſubſtance and manner. *Nothing more muſt be done than what the neceſſity requires.* The true objection to a deviation is not the increaſe of the riſk. If that were ſo, it would only be neceſſary to give an additional premium. It is, that the party contracting has voluntarily ſubſtituted another voyage for that which has been inſured. If the voyage to *Bengal* was unavoidable, where was the neceſſity to trade? All the ports touched at were out of the direct courſe; and ſix weeks and two months were conſumed, inſtead of ſix days. The juſtice of the caſe required a different deciſion." The rule for a new trial was accordingly made abſolute. The cauſe was again ſet down for trial; but the plaintiffs, when they were ready to be called on, ſubmitted to the opinion of the court, and abandoned their claim againſt the underwriters.

So alſo if a ſhip be inſured upon a trading voyage, it is incumbent on the parties aſſured, to carry on that trade with uſual and reaſonable expedition, otherwiſe their conduct will amount to a deviation, and diſcharge the policy.

Thus in an action by the aſſured againſt an underwriter on a policy of inſurance on the ſhip *Bloſſom*, at and from the coaſt of *Africa* to the *Weſt Indies*, with liberty to exchange goods and ſlaves; a verdict was given for the plaintiff. But upon a rule being obtained to ſhew cauſe why there ſhould not be a new trial, it apeared that there had been a great deal of contradictory evidence, and many points ſtarted at the trial; but the queſtion now made was, Whether the plaintiff, by the uſe he made of the veſſel on the coaſt of *Africa*, and the delay he there occaſioned, was not the cauſe of the loſs; that is, whether he did not make ſuch uſe of her during her ſtay on the coaſt, contrary to the deſign of the policy, as amounted to a deviation? Hart'ey v. Buggin, B. R. Mich. 22 Geo. III.

It appeared in evidence, that this ſhip ſtayed on the coaſt from *Auguſt* to *March*; that ſhe was employed in receiving ſlaves on board, the produce of the cargoes of other ſhips, which were afterwards put on board other ſhips, and ſent to the *Weſt Indies*; that this is the employment of what they call a *factory ſhip*; but that a regular factory ſhip is thatched and covered, and receives the ſlaves till a ſufficient number is collected to ſend away in the

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veſſels; but it did not appear that any ſlaves, the produce of the *Bloſſom*'s own cargo, were ſent away in other veſſels, but that her ſtay there was ſeveral months beyond the uſual ſtay of ſhips in that trade. After argument at the bar,

Lord *Mansfield* ſaid, "When different points are agitated at a trial, and a great deal of evidence applied to each, and the counſel go out of the cauſe, it is not to be wondered at, if juries ſhould loſe their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cauſe goes down again winnowed from the chaff of the firſt trial. The ſingle point here is, Whether there has not been what is equivalent to a deviation, whether the riſk has not been varied? it is not material whether or not the riſk has been greater. If a ſhip inſured for a trade, is turned into a floating warehouſe, or a factory ſhip, the riſk is different, it varies the ſtay, for while ſhe is uſed as a warehouſe, no cargo is bought for her. The law being clear, how is the fact? The captain ſays ſhe was not uſed as a factory ſhip, his evidence is much impeached; but he ſays he was young in the trade; he never ſaw a factory ſhip but once, and was not in her; he might have a ſalvo, becauſe this was not thatched; but was ſhe uſed as a thatched ſhip is uſed? It is ſaid that letters are not records; 'tis true they may be contradicted; but if they are from the parties, and are not contradicted, they are as ſtrong as any records. The fact is clear, the riſk is different in point of length, *&c.*" Rule abſolute for new trial.

Parkinſon v. Collier, Sitting in K. B. after Mich. 1797.

So in an action on a policy from *London* to *Port Endick*, on the coaſt of *Africa*, at ſix guineas *per cent.* on the ſhip till moored at anchor 24 hours, *and on goods till diſcharged and ſafely landed.* The ſhip arrived on the coaſt on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The barter in the trade is carried on, on board the veſſel, and the goods afterwards ſent on ſhore, in boats, and the gums brought back. In this caſe, the diſcharge of the cargo had not begun, the gums not having been brought down to the coaſt, for which purpoſe it is neceſſary to have a previous agreement with the king of the country; but no delay had been uſed. The counſel for the defendant contended, that by the cuſtom of this trade, the riſk on the goods, as well as on the ſhip, expired in 24 hours, and that the riſk on the

the cargo, while on the coaſt, was protected by the homeward policy, at 15 guineas *per cent.*—Lord *Kenyon* refuſed the evidence, both of the homeward policy, and of this ſuppoſed uſage (which he had on a former occaſion admitted againſt his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the riſk, *till the goods were landed.* That if, *in landing*, any unneceſſary delay had been uſed, that might amount to ſomething in the nature of a deviation, ſo as to diſcharge the inſurer; but that did not appear to be the caſe in the preſent inſtance.

But though an actual deviation from the voyage inſured is thus fatal to the contract of inſurance; yet a deviation merely intended, but never carried into effect, is conſidered as no deviation, and the inſurer continues liable. This has been frequently ſo decided. Thus in the caſe of an inſurance from *Carolina* to *Liſbon*, and at and from thence to *Briſtol*; it appeared, that the captain had taken in ſalt, which he was to deliver at *Falmouth* before he went to *Briſtol*; but the ſhip was taken in the direct road to both, and before ſhe came to the point, where ſhe would have turned off to *Falmouth*. It was held, that the inſurer was liable; for it is but *an intention to deviate*, and that was held not ſufficient to diſcharge the underwriter.

Foſter v. Wilmer, 2 Sra. 1249.

Lord Chief Juſtice Lee.

In the caſe of *Carter* v. the *Royal Exchange* Aſſurance Company, where the inſurance was from *Honduras* to *London*, and a conſignment to *Amſterdam*: a loſs happened before ſhe came to the dividing point between the two voyages, for which the inſurers were held liable to pay.

2 Stra. 1249.

The doctrine laid down in theſe caſes has ſince been frequently recognized in ſubſequent deciſions, and particularly by Lord *Mansfield* in the caſe of *Thelluſſon* v. *Ferguſſon*, which will be fully reported in the next chapter. The inſurance was from *Guadaloupe* to *Havre*, and by the depoſitions it appeared that the ſhip ſailed for *Havre*, and was always intended for *Havre*; but was directed to keep in the courſe of *Breſt* for ſafety. One of the grounds of defence was, that the ſhip never ſailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*. Lord *Mansfield*, in anſwer, ſaid, "the voyage to *Breſt* was, at moſt, but an *intended deviation*, not carried into effect."

Doug. 361.

If,

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If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties to fail upon the voyage insured; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the court of King's Bench, in a modern case: and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

Wooldridge v. Boydell, Dougl. 16.

The ship *Molly* being insured "at and from *Maryland* to *Cadiz*," was taken in *Chesapeake Bay*, in the way to *Europe*. Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appear to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market:" and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange*'s Reports.

Lord *Mansfield*.—"The policy, on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage

to

to *Cadiz*. All contracts of insurance must be founded on truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnication adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo* and *ad quem*, were certain and the same. Here, Was the voyage ever intended for *Cadiz?* There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. A *market* is not synonimous to *Cadiz:* that expression might have meant *Naples*, *Leghorn*, or *England*. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure."

Mr. Justice *Buller*.—"I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff: but it does not apply here. This is a question of fact. There cannot be a deviation from that, which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*."

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurring in the opinion delivered by Lord *Mansfield* and Mr. Justice *Buller*, the rule for a new trial was discharged.

In a still later case the same doctrine was advanced; namely, that if a ship be insured from a day certain from *A.* to *B.*, and before the day sail on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

Way v. Modigliani, 2 TermRep. 30.

Since

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Since the second edition of this work was published, the cases *Wooldridge* v. *Boydell*, and *Way* v. *Modigliani*, have again come under discussion in the court of Common Pleas; and it has been held by the four judges of that court, one of whom sat in the court of King's Bench when the two cases just reported were decided, that where the *termini* of the intended voyage continue the same as those described in the policy, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate the insurance till actual deviation. The case has already been quoted for another purpose; and the facts as to this point are shortly these. The insurance was *at and from Grenada to Liverpool*; the ship sailed from *Grenada*, *bound for Liverpool*, but with a design *formed before the commencement of the voyage*, as appeared by the clearances, and was admitted on all sides, *to touch at Cork, in her way to Liverpool*, but was totally lost before she arrived at the dividing point. In the course of the argument a case of *Stott* v. *Vaughan*, was mentioned, as having been tried before Lord *Kenyon*, at the sittings at *Guildhall*, after Hilary Term 1794, in which his Lordship nonsuited the plaintiff, in an action on a policy on this very ship, being of opinion that the case fell within those of *Wooldridge* v. *Boydell*, and *Way* v. *Modigliani*, and that there was no inception of the voyage insured. The court of Common Pleas, however, having taken time to deliberate upon this case of *Kewley* v. *Ryan*, delivered their opinion as to the 3d question, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge* v. *Boydell*, it appeared there was no intention that the ship should go to *Cadiz* at all, which was mentioned in the policy as her port of delivery; and in *Way* v. *Modigliani* there was an actual deviation, by the ship going to fish on the banks of *Newfoundland*: those cases therefore were wholly different from the present, for here the ship was really bound to *Liverpool*, though there were also clearances for *Cork* (*a*).

Kewley v. Ryan, 2 H. Black. Rep. p. 343. See ante, p. 22.

(*a*) See the case of *Middlewood* v. *Blakes*, 7 Term Rep. 162. where the several cases immediately preceding on the distinction between deviations intended, but not carried into effect, and non-inception of the voyage insured, are much considered.

From

From the propoſition juſt eſtabliſhed, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate conſequence, that whatever damage is ſuſtained before actual deviation, will fall upon the underwriters.

Thus it was held by Lord Chief Juſtice *Holt*, who ſaid, that if a policy of inſurance be made to begin from the departure of the ſhip from *England* until, *&c.* and after the departure a damage happens, *&c.* and then the ſhip *deviates;* though the policy is diſcharged from the time of the deviation, yet for the damages ſuſtained before the deviattion, the inſurers ſhall make ſatisfaction to the inſured. Green v. Young, 2 Ld. Raym. 840. 2 Salk. 444. S. C.

Subject to the rules already advanced, deviation or not is a queſtion of fact, to be decided according to the circumſtances of the caſe. Dougl. 737.

In caſes of deviation, the premium is not to be returned; becauſe the riſk being commenced, the underwriter is entitled to retain it. Vide poſt. c. 19.

In the caſe of *Hogg* v. *Horner*, above quoted, Lord *Kenyon* being of opinion that the ſhip had deviated, it was inſiſted for the plaintiff, that as the intention to go to *Faro* (the going to which place was the deviation relied on by the defendant) had exiſted prior to the ſailing, it was a non-inception of the voyage inſured, and he had a right to the return of premium. Lord *Kenyon*, however, was of opinion that there was an inception of the riſk *at*, and the contract was entire, conſequently there could be no return of premium. But of this, more will be ſaid in a ſubſequent chapter. Vide ante, p. 394.

CHAPTER THE EIGHTEENTH.

Of Non-Compliance with Warranties.

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IN the two preceding charters we have ſeen the effect, which the non-obſervance of implied conditions has upon the contract of inſurance; we ſhall now proceed to conſider the nature of warranties; their various kinds; and how far they muſt be complied with on the part of the inſured, in order to render the contract binding between the parties. A warranty in a policy of inſurance is a condition or a contingency, that a certain thing ſhall be done or happen, and unleſs that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but being once inſerted, it becomes a binding condition on the inſured: and unleſs he can ſhew that he has literally fulfilled it, or that it was performed, the contract is the ſame, as if it had never exiſted. We have already ſeen that the breach of an implied condition is ſufficient to avoid the policy; *à fortiori*, therefore, the effect muſt be the ſame, where the condition is expreſs, and not liable to miſrepreſentation or error, becauſe it makes a part of the written contract. To ſay that the underwriter ſhould anſwer for a loſs, notwithſtanding the other party has failed in his engagements, would be to make a different rule in this ſpecies of contract, from that which ſubſiſts in every other; although this of all other contracts depends moſt upon the ſtricteſt attention to the pureſt rules of equity and good faith. Indeed the obligation to a ſtrict performance of all promiſes and conditions in every ſpecies of contract, may be deduced, as has been truly obſerved by an elegant moral writer, from the neceſſity of ſuch a conduct to the well-being, or the exiſtence of human ſociety.

1 Term Rep. P. 345.

Chap. 16, 17.

Paley's Mor. Phil.

We have ſaid that a warranty muſt be ſtrictly and *literally* performed; and therefore whether the thing, warranted to be done, be or be not eſſential to the ſecurity of the ſhip; or whether the

loſs

loſs do or do not happen, on account of the breach of the warranty, ſtill the inſured has no remedy; becauſe he himſelf has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himſelf by ſuch a condition. And though the condition broken be not, perhaps, a material one, yet the juſtice of the law is evident from this conſideration: that it is abſolutely neceſſary to have one rule of deciſion; and that it is much better to ſay, that warranties ſhall in all caſes be ſtrictly complied with, than to leave it in the breaſt of a judge or jury to ſay, that, in one caſe it ſhall, and another it ſhall not. The very meaning of a warranty is to preclude all enquiries into the materiality, or the *ſubſtantial* performance of it: and although ſometimes partial inconveniences may ariſe from ſuch a rule; yet upon the whole, it will certainly produce public ſalutary effects. The inſured is bound not to draw the underwriter into error, by falſe declarations reſpecting thoſe things, about which the contract is made. *Debet præſtare rem ita eſſe ut affirmavit.*

1 Term Rep. p. 346.

Pothier Tr. du Contrat d'Aſſurance, p. 197.

But as a warranty muſt be ſtrictly complied with in favour of the underwriter, and againſt the inſured, equal juſtice demands, and the true meaning of the contract of inſurance requires, that if a ſtrict and literal compliance with the warranty will ſupport the demand of the inſured, the deciſion ought to be in his favour, eſpecially when by ſuch a deciſion all the words in the policy will have their full operation.

In an action on a policy on goods, dated 9th *December* 1784, *loſt or not loſt, warranted well this 9th day of December* 1784; it appeared, that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th *December*; that the ſhip was well at ſix o'clock in the morning, but was loſt at eight o'clock the ſame morning.

Blackhurſt v. Cockell, 2 Term Rep. 360.

Upon a motion to ſet aſide a nonſuit, which had been entered, Lord *Kenyon* Chief Juſtice, *Aſhhurſt*, *Buller*, and *Groſe*, Juſtices, were clearly of opinion, that the warranty was ſufficiently complied with, if the ſhip were well at any time that day; that the nature of a warranty goes to determine the queſtion; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet muſt be literally complied with; ſtill if

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it be complied with, that is enough: that there was good reason for inserting these words, because they protected the underwriter from losses before that day, to which he would otherwise have been liable, as the policy was on the goods from the lading; and thus too, the words *lost or not lost* have also their operation.

Cowp. 607.

This being the case, it follows as a necessary consequence, that it is very immaterial to what cause the non-compliance is to be attributed; for if the fact be, that the warranty was not complied with, though perhaps for the best reasons, the policy has no effect. The contingency has not happened; and therefore the party interested has a right to say, that there is no contract between them. Upon this account it is, that if a ship be warranted to sail on or before the 1st of *August*, and she be prevented by any accident from sailing till the 2d of *August*, as by the sudden want of any necessary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to sail: but there would be an end of the policy.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and a representation.

Vide ante, c. 10.

Of this distinction something was said in a preceding chapter: it is sufficient now to observe, that a warranty, as part of the agreement, and a condition on which it was made, must be *strictly* complied with, whereas a representation need only be performed *in substance*. In a watranty, the person making it takes the risk of its truth or falsehood upon himself: in a representation, if the insured assert that to be true, which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud. But a representation, made without fraud, if not false in a *material* point, or if it be *substantially*, though not *literally* fulfilled, does not vitiate the policy.

Pawson v. Watson, Cowp. 787.

So said by all the Judges, in the case of Lothian v. Henderson, House of Lords, 3 Bos & Pull. 499.

But as representations were very often made in writing, by way of instructions for effecting a policy, it became necessary to specify, what written declarations should be deemed warranties, and what representations. It was, therefore, by several decisions of the courts, held to be law, that *in order to make written instructions valid and binding as a warranty, they must appear on the face of the instrument itself, by which the contract of insurance is effected.*

This

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This was declared by Lord *Mansfield* in a very particular manner in anſwer to a queſtion put to him by Mr. *Davenport* at the deſire of the underwriters, after he had delivered the opinion of the court upon a queſtion on a repreſentation.

Pawſon v. Watſon, Cowp. 790.

Even though a written paper be *wrapt up in the policy*, when it is brought to the underwriters to ſubſcribe, and ſhewn to them at that time; or even though it be *wafered to the policy*, at the time of ſubſcribing; ſtill it is not in either caſe a warranty, or to be conſidered as part of the policy itſelf, but only as a repreſentation. Both theſe inſtances have occurred in cauſes before Lord *Mansfield*.

In an action on a policy of inſurance, the counſel for the defendant offered to produce witneſſes to prove, that a written memorandum incloſed was always conſidered as part of the policy. But Lord *Mansfield* ſaid, it was a mere queſtion of law, and would not hear the evidence; but decided that a written paper did not become a ſtrict warranty, by being folded up in the policy.

Pawſon v. Barnevelt, at Guildhall, Trin. Vacat. 1779. Dougl. p. 12. in the notes.

In the other caſe it appeared, that at the time when the inſurers underwrote the policy, a ſlip of paper was wafered to it, deſcribing the ſtate of the ſhip as to repairs and ſtrength, and alſo mentioning ſeveral particulars of her intended voyage, which particulars in the event had not been complied with. Lord *Mansfield* ruled, that this was only a repreſentation; and if the jury ſhould think there was no fraud intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed, did not tend to increaſe the riſk of the underwriters, he directed them to find for the plaintiff, which they accordingly did. This verdict was afterwards ſet aſide upon another ground (*a*).

Pize v. Fletcher, at Guildhall Eaſt. Vacat. 1779. Dougl. p. 12. in the notes.

It being thus ſettled, that a warranty muſt appear on the face of the inſtrument, it ſtill became a queſtion, whether a warranty, written in the margin of the policy, was to be conſidered equally binding, and ſubject to the ſame ſtrict rule of conſtruction, as if inſerted in the body of the policy itſelf. This point came un-

(*a*) But if a policy of inſurance *refer* to certain printed propoſals, the propoſals will be conſidered as part of the policy. *Worſley* v. *Wood*, in error, 6 Term Rep. 710. See alſo *Routledge* v. *Burrell*, 1 H. Black. 254.

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der the conſideration of the court in the caſe of *Bean* and *Stupart*, in which the material queſtion was, Whether, ſuppoſing it to be a warranty, *boys* were included under the word *ſeamen?* That caſe, as far as it is material to our preſent enquiry, was as follows:

Bean v. Stupart Doug. 11.

The plaintiff inſured the ſhip called the *Martha*, at and from *London* to *New York*; the voyage to commence from a day ſpecified; and in the *margin* of the policy were written theſe words, "Eight nine pounders with cloſe quarters, ſix ſix pounders on her upper decks; thirty ſeamen beſides paſſengers."

Upon a motion for a new trial in this caſe, Lord *Mansfield* ſaid, there is no doubt but this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with, becauſe it is a condition on which the contract is founded.

Kenyon v. Berthon, Mich. Vac. 1780. Doug. p. 12. (note 4.)

In an action on a policy of inſurance, it appeared that the following words were written tranſverſely on the margin of the policy: "In port 20th *July*, 1776." In fact, the ſhip had ſailed the 18th of *July*. The queſtion was, Whether this marginal note was a warranty or a repreſentation?

Lord *Mansfield*.—"The queſtion is, Whether the ſhip's being in port on the 20th is part of the condition of the inſtrument? When it is on the face of the inſtrument, it is a part of the policy; ſo that here, if the ſhip was not in port, it is no contract. As to its being only in the margin, that makes no difference: it is all part of the contract when it is *once* ſigned. And though the difference of two days may not make any material difference in the riſk, yet as the condition has not been complied with, the underwriter is not liable."

The propriety of theſe deciſions has never been queſtioned, and the rule has been conſtantly and tacitly acquieſced in from the time in which theſe caſes were determined till the year 1786, when, notwithſtanding the uniformity of the determinations upon the ſubject, it once more became an object of diſcuſſion.

It

De Hahn v. Hartley 1 Term Rep. p. 343.

It came before the court upon a ſpecial verdict: it was an action of aſſumpſit brought by the plaintiff (an underwriter) againſt the defendant, to recover back the amount of a loſs which he had paid upon a policy of inſurance. The defendant pleaded the general iſſue. The cauſe came on to be tried before Mr. Juſtice *Buller*, at *Guildhall*, when the jury found a ſpecial verdict, ſtating:

That the defendant on the 14th of *June* 1779, gave to his inſurance broker inſtructions in writing, to cauſe an inſurance to be made on a certain veſſel, called the *Juno*. (Then the inſtructions are ſet out in the verdict, ſigned by the defendant.) The verdict then ſtates that the broker, in conſequence of ſuch inſtructions, on the ſaid 14th of *June* 1779, did cauſe a policy of inſurance to be made on the *Juno*, upon goods and merchandizes laden on board, and alſo on the ſhip, at and from *Africa*, to her port or ports of diſcharge in the *Britiſh Weſt Indies*, at and after the rate of 15*l. per cent.* The verdict, after reciting two memorandums, not material, then proceeded to ſtate, that *in the margin of the ſaid policy were written the words and figures following:* "Sailed from *Liverpool* with 14 ſix-pounders, ſwivels, "ſmall arms, and 50 *hands or upwards*; copper ſheathed;" That the plaintiff underwrote the policy for 200*l.* at a premium of 31*l.* 10*s.* That the *Juno* ſailed from *Liverpool* on the 13th of *October* 1778, having then only 46 *hands on board her*, and arrived at *Beaumaris*, in the Iſle of *Angleſea*, in ſix hours after her ſailing from *Liverpool*, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris*, on her ſaid voyage; and that at *Beaumaris* the *Juno* took in ſix hands more, and then had, and during the ſaid voyage, until the capture thereof, continued to have 52 hands on board her. That the ſaid ſhip in the voyage from *Liverpool* to *Beaumaris*, until and when ſhe took in the ſaid ſix additional hands, was equally ſafe, as if ſhe had had 50 hands on board her for that part of the voyage. The verdict then ſtates, that the defendant was intereſted, and that the ſhip was captured: that on receiving an account of the loſs of the veſſel, the plaintiff paid to the defendant the ſum of 200*l.* not having then had any notice that the ſaid ſhip had only 46 hands on board her when ſhe ſailed from *Liverpool*.

For the defendant it was ſaid, that this repreſentation had no relation to the voyage inſured; for that was *at and from Africa*.

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&c. whereas this is merely an account of the ſtate of the ſhip at *Liverpool*.

Lord *Mansfield*.—" There is a material diſtinction between a warranty and a repreſentation. A repreſentation may be *equitably* and *ſubſtantially* anſwered; but a warranty muſt be *ſtrictly* complied with. Suppoſing a warranty to ſail on the 1ſt of *Auguſt*, and the ſhip did not ſail till the 2d, the warranty would not be complied with. A warranty in a policy of aſſurance, is a condition or a contingency, and unleſs that is performed there is no contract. It is perfectly immaterial, for what purpoſe a warranty is introduced; but being inſerted, the contract does not exiſt unleſs it is literally complied with. Now in the preſent caſe, the condition was, the ſailing of the ſhip with a certain number of men, which not being complied with, the policy is of no effect."

Mr. Juſtice *Aſhhurſt*.—" The very meaning of a warranty is to preclude all queſtions whether it has *been ſubſtantially* complied with: it muſt be *literally* ſo."

Mr. Juſtice *Buller*.—" It is impoſſible to divide the words written in the margin, in the manner which has been attempted at the bar; that that part which relates to the copper ſheathing ſhould be a warranty, and not the remaining part. But the whole forms one entire contract, and muſt be complied with throughout." Judgment for the plaintiff. A writ of error was brought in the Exchequer-chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight judges, compoſing that court. *Michaelmas* Term 1787, 28 *Geo.* 3.

Having ſtated thoſe rules, which apply to warranties in general, it will now be proper to conſider the ſeveral kinds of warranties, and thoſe principles which are peculiar to each ſpecies, confirmed by deciſions of the courts. It would be endleſs to enumerate the various warranties that are to be found in policies: becauſe they muſt frequently, and for the moſt part do depend upon the particular circumſtances of each caſe; ſuch as the number of men, of guns, being copper ſheathed, &c.

But

But thoſe which moſt frequently occur in our books of reports, and upon which the greateſt queſtions have ariſen, may be reduced to three claſſes: Warranty as to the time of ſailing; warranty as to convoy; and warranty of neutrality. Of each of theſe we ſhall treat; obſerving in the firſt place, that thoſe rules which are applicable to warranty in general, muſt neceſſarily alſo apply to each of theſe individually.

1ſt, As to the time of ſailing. In moſt voyages, the time at which they are to commence is a material circumſtance; becauſe in every country there are ſome ſeaſons when navigation is much more dangerous than at others, owing to periodical winds, monſoons and various other cauſes. Indeed, we have ſeen, that a man having once warranted to ſail on a particular day, whether the riſk be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer anſwerable. But this ſtrict adherence to the very day ſpecified, muſt have ariſen from the principles juſt ſtated: for if a latitude of one day were given, why not extend it farther? It has therefore been held, that when a ſhip has been warranted to ſail on a particular day, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force; the warranty has not been complied with, and the inſurer is diſcharged from his contract.

Roccus, Not. 38.

Kenyon v. Berrilon, ſupra.

Thus in an action on a policy of inſurance, upon a motion to ſet aſide the verdict which had been given for the plaintiff, the caſe appeared to be this. The declaration ſtated, that a policy was made on the ſhip *New Weſtmorland*, at and from *Jamaica* to *London*, *warranted to ſail on or before the 26th of July* 1776, free from capture, and free from all reſtraints and detainments of kings, princes, and people of what nation, condition, or quality ſoever. It further ſtated, that the ſaid ſhip was prepared and ready to ſail, and would have ſailed on the 25th of *July*, on her intended voyage, *if ſhe had not been reſtrained by the order and command of Sir Baſil Keith*, the then governor of *Jamaica*, and *detained beyond the day:* that ſhe afterwards ſailed and was captured. For the plaintiff it was ſaid, that the uſual clauſe againſt the detention of rulers and princes being inſerted in this policy, the embargo, by which the ſhip was prevented from ſailing on the day mentioned in the war-

Hore v. Whitmore, Cowp. 784

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ranty, came expreſsly within the meaning of it, and therefore excuſed the delay.

On the other hand it was ſaid, that the loſs of the ſhip could in no poſſible reſpect be connected with the embargo. That the warranty was *poſitive and expreſs*: that the ſhip ſhould depart on or before the day appointed, and therefore muſt be complied with. Of this opinion was the Court; and accordingly the rule to ſet aſide the verdict for the plaintiff, and to enter a non-ſuit, was made abſolute.

But the neceſſity of a punctual adherence to the day on which the ſhip is warranted to ſail by the policy, is not peculiar to the law of *England*: for we find that foreign writers declare, that the ſame rule is univerſally adopted. If, ſay they, the owner of the ſhip or goods has ſaid in the policy, that he will be ready to ſail at a particular time, at which, perhaps, the navigation may be leſs dangerous; and on this account the inſurer is more eaſily induced to underwrite the policy; and he afterwards delay the time of ſailing, and the ſhip and goods periſh, the underwriter is not bound, for he who neglects to depart at the appointed time, muſt, if he ſail at a ſubſequent period, do it entirely at his own riſk (*a*).

Roccus, Not. 38.

If the warranty be to ſail *after* a ſpecific day, and the ſhip ſail before, the policy is equally avoided as in the former caſe; becauſe the terms of the warranty are as much departed from in the one caſe as in the other.

On the 8th of *December* 1777, a policy was underwriten by the defendant on goods in a *French* ſhip, *Le Compte de Trebon*, "at and from *Martinico* to *Havre de Grace*, with liberty to "touch at *Guadaloupe*; *warranted to ſail after the* 12*th of Ja-*"*nuary*, and on or before the firſt of *Auguſt* 1778." The inſurance was made by the plaintiff on account of *Jacques Hortelloupe* and *Louis de Lamare* of *Havre de Grace*, owners of the ſhip and cargo; at which time it was not known whether ſhe would

Vezian v. Grant, before Mr. Juſt. Buller, Guildhall, Eaſt. Vac. 1779.

(*a*) Roccus, in this paſſage, quotes the work of Santerna, upon inſurances, who, he obſerves, *exclamat contra magiſtros navium, et nautas, quando detinentur in portu a mulieribus, et dulcedine vini.*

2 load

load at *Martinico* or *Gaudaloupe*, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at *Martinico*, *sailed from thence on the 6th of September* 1777, for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*; from whence she sailed on the 26th of *June* 1778, and was taken on the 3d of *September*. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at *Guildhall*, before Mr. Justice *Buller*, when the defendant's objections were, that according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of sailing was not complied with, *the ship having sailed from Martinico before the 12th of January* 1778, to wit, on the 6th of *November* 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant.

But when a ship is warranted to sail on or before a particular day, if she sailed from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the same island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an enbargo beyond the day. The ground is, Cowp. 603. that when a ship leaves her port of loading, when she has a full and complete cargo on board, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. If, indeed, her cargo was not complete, it would not have been a commencement of the voyage. It is true, in the case about to be reported, Lord *Mansfield* was of a different opinion at the trial; and it certainly was a case of considerable difficulty: but when it came again before the Court, it underwent a great deal of discussion, and after long and mature deliberation of all the judges, his lordship candidly acknowledged that his former decision was wrong; and upon a subsequent occasion, he declared he was completely convinced, that the voyage

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commenced from the port of loading. As that is the leading case upon this subject, it is here reported at length.

Bond v. Nutt, Cowp. 601.

This was an action on a policy of insurance upon the ship *Capel* in the *West India* trade, lost or not lost, *at and from* Jamaica *to* London; *warranted to have sailed on or before the first of* August 1776. The policy was effected on the 20th of *August* 1776, at a premium of 15 guineas *per cent.* to return 5 *per cent.* if the ship departed with convoy; and 8 *per cent.* if with convoy for the voyage, and arrived safe. At the trial, there was no controversy about the facts; and they are shortly these: the ship was completely laden for her voyage to *England*, at *St. Anne's* in *Jamaica; and sailed from* St. Anne's Bay, *on the 26th of* July *for* Bluefields, *in order to join the convoy there*, *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*, and where a vonvoy then lay, which was expected to sail for *England* every day: but the greater part of the way from *St. Anne's* to *Bluefields*, is out of the direct course of the voyage from *St. Anne's* to *England*. That she arrived off *Bluefields* on the 28th or 29th of *July*, where she was immediately stopped by an embargo laid on all vessels being in any part of *Jamaica*, and was detained there till the 6th of *August*, when she sailed with the convoy for *England*; but afterwards, being separated in the passage, was taken by an *American* privateer. Upon these facts the jury found a verdict for the defendant. When this case was first argued at the bar, two points were relied upon for the defendant, in support of the verdict, which the jury had given in his favour: 1st, That the departure from *St. Anne's* was not a departure from *Jamaica*, within the meaning of the policy. 2d, If it were, that the going to *Bluefields* was a deviation. Upon the first argument, Lord *Mansfield* said: One point now started is entirely new: that supposing the voyage to have begun from *St. Anne's*, that going to *Bluefields* (which, it is admitted on all hands, was out of the course of the voyage) though for the purpose of convoy only, shall be considered as a deviation. In answer, it has been said by the counsel for the plaintiff, that there are cases in which the contrary has been held: but they are not cited. I could wish therefore that these cases might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

Vide the preceding chapter.

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The second point was again argued; and then the judges severally mentioned their ideas upon the subject, without coming at that time to any decision.

Lord *Mansfield*.—"I am extremely glad this motion has been made; the cause came on at *Guildhall*, by the candour of the parties in the fairest manner. But I had no intimation of its being a cause of consequence till after the verdict; when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued an both sides. I have thought much of it since the trial. Some things are clear, and there are others which require consideration. The policy was made on the 20th of *August* 1776, upon the contingency of a fact, which must have existed one way or the other at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of *August*: consequently it must have taken place or not upon the 20th of that month. The port, from whence the ship was to be insured, was, if I may use the expression, the whole island of *Jamaica*: but from which of the ports the ship would sail, neither party knew: therefore they have used the words, "at and from *Jamaica*:" by force of which she certainly was protected in going from port to port, and till she sailed. It follows, that the word *sailed* in the warranty, must mean that she had sailed *on her homeward-bound voyage*. The question then is a matter of fact; and one that admits of no latitude, no equity of construction, or excuse. Had she or had she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is, that she had not sailed, though she staid behind for the best reasons, the policy was void: the contingency had not happened; and the party interested had a right to say, there was no contract between them. Therefore what was said in argument is very true: if she had been prevented by any accident from sailing till the second of *August*, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has been begun: there the usage of the voyage may justify going a little out of the direct course. This also is clear; if the ship had broken ground, and been fairly under sail upon her voyage for *England* on the 1st of *August*, though she

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she had gone ever so little away, and had afterwards put back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo, and had been detained till *September*, it would still have been a *beginning* to sail; and the stoppage would have come too late: because the warranty was upon a fact antecedent Such a case happened before me a day or two after the present action was tried. It was an insurance upon a ship from *Grenada* to *London*, *warranted to sail on or before the 1st of August*. She had barely begun to sail on the day, when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun; the jury were of that opinion: and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this: Did the voyage from *Jamaica* homeward begin from *St. Anne's*, or from *Bluefields?* Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable, and for the benefit of all parties: but still it does not vary the fact of sailing. Here it was very reasonable: but the question, whether the voyage began from *St. Anne's* or *Bluefields*, still remains. Another material circumstance arises from the words, "at and from *Jamaica*." At the trial, I reasoned thus: "By the terms of the policy she was protected during her stay at *Jamaica*: by force of them, she had "a right to go to any port, or all round the island; and she went "to *Bluefields* for reasons best known to herself. Therefore the "voyage began from *Bluefields*." Had the insurance been at and from the port of *St. Anne's*, it did strike me, that going round the island to *Bluefields*, would have been a deviation. But this a question of so much value and consequence, that the Court wishes to consider the case thoroughly, before they give a final decision upon it."

Thellusson v. Ferguson, at Guildhall, Hil. Vac. 1777.

Mr. Justice *Aston*.—"I shall be very glad to consider this case. As at present advised, it seems to me to depend upon a mere matter of fact: and therefore to be very different from the cases of deviation that have been put. In them, the change of voyage, being from necessity, is excused in point of law: but here, the whole question is, Did the *Capel* sail from *Jamaica* on or before the 1st of *August*, according to the true sense and meaning of the policy? If she had fairly commenced her voyage, on her departure from *St. Anne's*, and the going to *Bluefields* is to be taken as

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the uſage of the voyage, I ſhould think the underwriters would be liable. So, if ſhe had broken ground for the voyage, and had gone but a league, and been blown back again. But if ſhe had found no convoy at *Bluefields*, ſhe could not have ſtaid there to wait for convoy: that would have vacated the policy. So, if her going to *Bluefields* is to be conſidered only as a continuation of her ſtay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne*'s to depart for the voyage: and ſhe went to *Bluefields*, not to take in part of her cargo (for then it would clearly not have been a commencement of the voyage), but from a juſt motive. Whether that was or was not a commencemen of the voyage, is clearly a matter of fact; and in this caſe a very material one; therefore ought to be very fully conſidered."

Mr. Juſtice *Willes*.—"This is clearly a matter of fact. I think if the ſhip upon her arrival at *Bluefields* had found no convoy, ſhe could not have ſtaid there; but muſt have ſailed immediately: or if ſhe had met with convoy, and had ſtaid an unreaſonable time for other ſhips, the inſurers would not have been liable."

After theſe opinions, which evidently lean in ſupport of the verdict, had been delivered, the Court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*.—"We are all ſatisfied that the truth of the caſe is, that the voyage from *Jamaica* to *England* began from *St. Anne*'s. That when the ſhip ſailed from *St. Anne*'s, ſhe had no view or object whatſoever, but to make the beſt of her way to *England*. That the value of this queſtion, admitted on both ſides, ſhews, that every other ſhip, under the ſame circumſtances, looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the ſafeſt courſe of navigation from *Jamaica* to *England*; and that it would have been unwiſe and imprudent for any ſhip not to have touched there. The great diſtinction is this: that ſhe ſailed from *St. Anne*'s for *England by way of Bluefields*; and that it was not a voyage from *St. Anne*'s to *Bluefields* with any object or view diſtinct from the voyage to *England*. If ſhe had gone firſt to *Bluefields* for any purpoſe independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none

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none being ready, that would have given it the condition of one voyage from *St. Anne*'s to *Bluefields;* and another from *Bluefields* to *England.* But here, under all the circumſtances, we think ſhe had no other object than to come directly to *England* by the ſafeſt courſe." Therefore the rule for a new trial was made abſolute.

A few years afterwards a ſimilar deciſion was made; and the only difference between the caſes was this, that in the caſe now to be mentioned, it was a condition inſerted in one of her clearances, that ſhe ſhould paſs *by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. But this was not thought ſufficient to induce the Court to depart from the deciſion in *Bond* and *Nutt;* eſpecially as in this caſe, the place where the ſhip was detained was in the direct courſe of the voyage.

Thelluſſon v. Fergusſon, Dougl. 361.

It was an action on a policy of inſurance on the *French* ſhip *L'Aimable Gertrude,* "at and from *Guadaloupe* to *Havre,* warranted to ſail on or before the 31ſt *of December.*" It was tried before Lord *Mansfield,* when a verdict was found for the plaintiff. A motion having been made for a new trial, the caſe from his Lordſhip's report appeared to be as follows: *The ſhip toook in her complete lading and proviſions for France, and all her clearances and papers* at a port, called *Pointe a Pitre,* in the iſland of *Guadaloupe,* and *ſailed from thence on the* 24*th of October,* for *Baſſeterre,* where there is no port, but only an open road. The town of *Baſſeterre* is the reſidence of the *French* governor. The ſhip arrived there at night, when the captain went on ſhore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took his ſhip's papers from him. At this place he was detained with his ſhip till the 10th of *January,* when he ſet ſail with a convoy, which had arrived ſome little time before, and being ſeparated after ſome days from the convoy, the ſhip was taken by an *Engliſh* veſſel. The captain, who was the only witneſs produced at the trial, ſwore, that notice had been given on the part of the governor, ſome days before he ſailed, to him and the other captains of ſhips at *Pointe a Pitre,* who were preparing to ſail for *Europe,* that a convoy was expected to be at *Baſſeterre* from *Martinico,* on the 25th of *October,* and that in conſequence of this intimation, he had worked night and

and day to get ready, and had paid extraordinary gratifications to obtain the ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* some days beyond its time. The last ship papers, which he received at *Pointe a Pitre*, was *Le Role d'Equipage*, or the muster roll. This paper, which was much relied upon by the counsel for the defendant, was dated the 24th of *October*, and was in the following words: "Vu par nous, chargé du detail "des classes au department de La Grande terre *Guadaloupe*, "l'equipage denommé au role des autres parts au nombre de "vingt personnes, le capitaine compris. Permis au Sieur *Jean* "*Jacques Lethuillier* commandant le navire *L'Aimable Gertrude* "du *Havre*, de s'en servir pour faire son retour, au dit lieu, "*passant a la Basseterre pour y prendre les ordres du governement* "en observant les ordonnances et reglemens de la marine." Under this there was wrtten, on the same paper, an account, dated the 30th of *October*, of some changes in the number of the crew, and under that, the following entry: "Vu par nous, "ecrivain de la marine chargé du detail des classes, les vingt "cinq personnes existantes au present rôle, le capitaine compris. "Il est permis au Sieur *Lethuillier* commandant le navire *L'Ai-* "*mable Gertrude*, du *Havre*, de faire son retour au dit lieu en "se conformant aux ordonnances et reglemens royaux de la "marine. A *Basseterre Guadaloupe*, le 2 *Janvier* 1779." On another paper, called Le Congé, dated the 16th of *October*, which was read on the part of the plaintiff, there was written, at the bottom, as follows: "Vu de relache a la *Basseterre Gaudalcupe*, "pour y attendre un convoi pour *France*. Ce 28 *October* 1778. "*Monentheill.*" The captain swore that he understood the only reasons for the condition in the muster roll, that he should go to *Basseterre*, were, the convoy was to be at that place, and that he might take such dispatches as were ready for *Europe*. He had not objected to it; because in the regular course of his voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other road, except they were to keep quite to the lee-ward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, but would have sent his

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his boat for the dispatches; but having arrived at night, his ship had been detained, contrary to his intention and expectation. The defendant's counsel, to invalidate the captain's testimony, besides the muster roll, and the entry under it, as above stated, read the protest made by the captain on his arrival at *Dover*; and also his deposition in answer to the 29th interrogatory in the proceedings in the Admiralty on the condemnation of the ship. The words of the protest, on which they relied, were as follows: "whereupon he (the captain) waited on the proper officer at "*Pointe a Pitre* for his muster roll, and was by him informed, "it could not be granted, but on condition that he should first "sail to *Basseterre*, and *there wait* the directions of the general "of the island." And in a subsequent part, "Whereupon at "his (the captain's) instance, the said *John Nicholas Lethuillier*, "his father came to *Basseterre*, and went with Messrs. *Gobert* "and *Betuel*, commissioners of commerce, to the superintendant, "and also to the general of the island, stating to them that the "said ship and cargo were insured upon condition that she should "have departed from the island of *Guadaloupe* before the 31st of "*December*, the terms of which insurance they judged it essential "to fulfil, notwithstanding which they were still refused per-"mission to depart, and were kept there until after the 31st of "*December*." The deposition relied on was as follows: "At "the time the ship was first pursued and taken, she was steering "her course towards *Brest*. Her course was not altered upon "the appearance of the vessel, by which she was taken. Her "course was at all times, when the weather would permit, di-"rected to *Brest*, for which port she was directed to sail, al-"though the destination was for *Havre de Grace*, by the ship's "papers. She was not, before nor at the time of the capture, "*sailing beyond or wide of Havre de Grace*. She was then about "eight leagues west of *Ushant*, and her course was not altered "to any other port or place, but was obliged to be directed to "*Brest*, in consequence of the orders he had received, subse-"quent to the delivery of the ship's papers." In answer to the 27th interrogatory, his deposition was, "That all the ship's pa-"pers found on board were true and fair, and none of them "false and colourable." At the trial the captain swore, that he had received directions to keep in the course to *Brest* at *Basseterre* from his father, who had formerly commanded the ship;

but

but this was done as the safest way, in time of war, of getting to Havre, which still continued to be the place of the ship's destination. Upon this evidence, the defendant's counsel made two objections, as grounds for a new trial: 1st, That there had been no inception of the voyage on the 24th of *October*, nor till after the 31st of *December:* 2dly, that the ship never sailed on the voyage insured, *viz.* from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. After both these points had been fully argued at the bar,

As to the 2d point vide ante, c. 17.

Lord *Mansfield* said:—"In my apprehension, there is no contradiction between the parole evidence, and the protest and depositions. This captain had never heard of the case of *Bond* and *Nutt*. Under an insurance at such a place as *Guadaloupe* or *Jamaica*, the ship is protected in going from port to port in th island. But the question here is, whether the voyage was *bonâ fide* commenced; and stopped by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain when he left *Pointe a Pitre*, expected to meet a convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre* at any rate, independent of the clause in the muster roll. With regard to the second point, the voyage to *Brest*, was, at most, but an intended deviation, not carried into effect."

Vide c. 17.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurred.

Mr. Justice *Buller*.—"The case in 1777 between the same parties is in point. There was no embargo there, nor in the present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which I think there was in this case. The ship was completely ready in all respects." The rule for a new trial was, therefore, discharged.

See Lord Mansfield's opinion in the cause of Bond v. Nutt, where he quotes the case alluded to.

Notwithstanding the uniformity of decision in all these cases, the judgment given in the last cause was not satisfactory to about twenty other underwriters upon the same policy, nineteen of whom obtained leave to consolidate their different causes upon the

See the Introduction for the His-

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tory of the Conſolidation Rule.

the uſual terms, in order to bring the queſtion once more into court. Accordingly, in the enſuing ſittings, the cauſe was ſet down for trial,

Thelluſon v. Staples, Sittings at Guildhall, Eaſt. Vac. 1780.

In this cauſe, the ſecond point as to the deviation was abundoned; and on the firſt, the ſame evidence was given as upon the former occaſion. The point was again fully argued for the defendant.

Lord *Mansfield*.—" The ſingle queſtion on this policy is, Whether the ſhip ſailed on her voyage to *Havre* before the 31ſt of *December?* She certainly ſailed from *Pointe a Pitre* completely loaded before that time. The doubt on the firſt queſtion of this ſort was this: the policy was " at and from *Jamaica*;" now the word *at* certainly compriſes the whole iſland, and, under that word, you may ſail from one port to another every where along the coaſt of the iſland. The ſhip, therefore, in that ſenſe, was ſtill at *Jamaica*, after ſhe had got to *Bluefields*. She did not leave *Bluefields* till after the day named in the warranty, and that place was quite out of the courſe of navigation from *St. Anne*'s to *England*. I own at the trial, I thought the voyage to *England* did not commence till the ſhip ſailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wiſhed (as I always do in ſuch caſes) that the opinion of the court might be taken in order to ſettle the point. The caſe, when it came on in court, was very ably argued; I was completely convinced, and the court were unanimouſly of opinion, that the voyage to *England* began when the ſhip ſailed from *St. Anne*'s; and upon the ſecond trial, the plaintiff had a verdict. *Earle* and *Harris*, was ſtill a ſtronger caſe. *There* an embargo was actually publiſhed, before the ſhip ſailed, and the captain, immediately after croſſing the bar, returned to make a proteſt, and ſent his ſhip knowingly into the embargo: but he ſwore that he expected the embargo was to be taken off, and that he ſhould proceed immediately upon his voyage; and the jury believed him. In this caſe to go by ſteps. There was public notification of a convoy to be at *Baſſeterre* on the 25th of *October*. The captain thought that it might be ſtopped a day or two at *Martinico*, and that he ſhould get to *Baſſeterre* in time. He worked night and day, paid double fees for his papers, and ſailed with full expectations

Earle v. Harris, at Guildhall, Hil. Vac. 1780.

of purſuing his voyage directly. He knew of no embargo, and *Baſſeterre* was directly in his road. In that reſpect, this caſe differs ſtrongly from *Bond* v. *Nutt*. He was even in the regular voyage obliged to paſs under the cannon of *Baſſeterre*. He had his muſter-roll, on condition of calling there; but he made no difficulty of taking it on that condition, becauſe he knew he muſt paſs that way at all events. Did he not *bonâ fide* begin his voyage? He certainly had no idea, when he ſailed from *Pointe a Pitre*, of meeting with any ſtop. So it was in the former caſe of *Thelluſſon* v. *Ferguſſon*. There was no idea of the embargo in that caſe, when the ſhip ſailed. Here there is not the leaſt ſuſpicion of fraud. This captain certainly did not know of the deciſion in *Bond* v. *Nutt*. He thought, when he was detained at *Baſſeterre* beyond the 31ſt of *December*, that the policy was forfeited, which is a ſtrong circumſtance in the plaintiff's favour, for it ſhews that the ſailing was not colourable. This queſtion has undergone the conſideration of a ſpecial jury and of the court. Underwriters have a right to litigate queſtions, which ſeem to them to be in their favour. But, at laſt, there ſhould be an end of litigation. If you ſhould be of the ſame opinion with the former jury and the court, you will find for the plaintiff:" which they did accordingly. The cauſe of the twentieth underwriter, on the ſame policy, who refuſed to conſolidate, ſtood next in the paper for trial; but upon the above verdict being given, his counſel conſented that a verdict ſhould alſo be entered againſt him.

The Grenada Caſe, Vide ſupra.

From this long train of uniform and conſiſtent determinations, it ſhould ſeem that the queſtion, what ſhall or ſhall not be a departure within the meaning of the warranty is now completely ſettled. In inſurances *at and from London*, warranted to depart on or before a particular day, it has long been a queſtion, what ſhall be a departure from the port of *London*; or rather what is the port of *London*: and it is ſingular that this point has never yet been judicially determined. On the one hand it is ſaid, that the moment a ſhip is cleared out at the cuſtom-houſe, and has all her cargo on board, if ſhe quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other ſide it is contended, and with great appearance of reaſon, that a ſhip is not ready for ſea, till ſhe has got her cuſtom-houſe cocket on board, which is the final clearance, and which

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ſhe cannot have till ſhe arrive at *Graveſend:* that till this cocke is received, the ſhip dare not proceed to ſea under a penalty, and till then is not entitled to the drawbacks, and that *Graveſend* is always conſidered as the limits of the port of *London*, and unleſs the ſhip ſailed from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited.

Rogers v. Royal Exchange Aſſu. Comp. Sitt. in C. P. after Mich. 1787, before Lord Loughborough.

In a late caſe, the Royal Exchange Aſſurance Company reſiſted a demand made upon them, in order to try this great queſtion: but as it appeared from the evidence of the log-book that the ſhip did not in truth break ground till after the day named in the warranty, the plaintiff was nonſuited; and the queſtion remains undecided.

Poſtlethw. Dict. tit. Convoy.

The ſecond ſpecies of warranty, which moſt frequently occurs in inſurances, is that of ſailing under the protection of convoy; that is, certain ſhips of force, appointed by government, in time of war, to ſail with merchantmen from their port of diſcharge to the place of their deſtination. When the nature of a convoy is conſidered, it is highly reaſonable, that the policy ſhould be forfeited, if the inſured fail to comply with ſo material a condition; becauſe the riſk, which the underwriter takes upon himſelf, is very conſiderably increaſed, in time of war, by the want of convoy. Accordingly, by the laws of this, and of all other maritime powers, if the inſured warrant that the veſſel ſhall depart with convoy, and it do not; the policy is defeated, and the underwriter is not reſponſible. We have already ſeen, that every warranty muſt be ſtrictly and literally complied with; and that a liberal and ſubſtantial performance merely will not be ſufficient. Hence in a warranty to ſail with *convoy*, it becomes material to conſider, what ſhall be deemed a *convoy* within ſuch a condition. Upon this point it has been ſolemnly ſettled by the court of King's Bench, Mr. Juſtice *Willes* excepted, who differed from the other learned judges upon that occaſion, that it is not every ſingle man of war, which chuſes to take a merchant ſhip under its protection, that will conſtitute ſuch a convoy as a warranty means; *but it muſt be a naval force under the command of a perſon appointed by the government of the country to which they belong.* The reaſon of ſuch a deciſion is wiſe; becauſe government muſt be ſuppoſed to be better informed of the deſigns and ſtrength of the enemy, and what degree of force would be ſufficient to repel their attempts.

1 Emerigon, Traité des Aſſurances, p. 164.

attempts. In the caſe, in which theſe points were ſettled, it alſo became a queſtion, how far ſailing orders from the commander in chief to the particular ſhip or ſhips, were requiſite to the conſtitution of a convoy. But it was not thought neceſſary to decide that point, although it ſeemed to be the opinion of the majority of the judges, that they were not abſolutely eſſential.

Hibbert v. Pigou, B. R. Eaſt. 23 Geo. III. 1783.

This caſe came before the court upon a rule to ſhew cauſe why the verdict, which the defendant had obtained, ſhould not be ſet aſide and a new trial had. It was an action upon a policy of inſurance on the ſhip *Arundel*, captain *Mann*, at and from *Jamaica* to *London*, *warranted to depart with convoy*. The inſurance was at 18 guineas *per cent.* to return 3 *per cent.* if the ſhip ſailed on or before the firſt of *Auguſt*. The facts appearing on the report of Lord *Mansfield*, who tried the cauſe, are theſe: On the 25th of *July* the *Arundel* ſailed from *Morant* harbour to *Kingſton*, where ſhe met the *Glorieux* man of war, Captain *Cadogan*, who was likewiſe on his way to join Admiral *Graves* at *Bluefields*. Lord *Rodney* had appointed Admiral *Graves* to rendezvous at *Bluefields*, in order to take the fleet of merchant ſhips, which were to ſail from thence upon the 1ſt of *Auguſt*, under his command, and to convoy them to *Great Britain*. Captain *Mann*, upon their meeting in *Kingſton* harbour, aſked for ſailing orders from Captain *Cadogan*, who ſaid, he had none, not having himſelf at that time joined the Admiral: but he was ſure that Admiral *Graves* would not ſail from *Bluefields* till the *Glorieux* joined him. However, if he ſhould have ſailed, he, Captain *Cadogan*, would give Captain *Mann* ſailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at *Bluefields* on the 28th of *July*; but they found that Admiral *Graves* had ſailed two days before. The *Glorieux* and *Arundel* then ſailed from *Bluefields*, the former firing guns, giving ſignals, and behaving in every reſpect *like a convoy*. Upon the fifth of *Auguſt* a ſignal was made, that the fleet was in ſight; and on the ſeventh they joined the fleet off *Cape Anthonio*. The *Arundel* was afterwards loſt in *September*, in a dreadful ſtorm, which diſperſed the whole fleet, and in which a vaſt number of the ſhips periſhed. Upon this evidence, the jury were of opinion, under the direction of the Chief Juſtice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After

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this queſtion had been fully argued at the bar, the three judges, Mr. Juſtice *Aſhhurſt* being, at that time, one of the Lords Commiſſioners of the Great Seal, delivered their opinions ſeverally.

Lord *Mansfield*.—"Though the underwriters and inſured are equally innocent; yet I cannot help ſaying, that now, as well as at the trial, my inclination led me to wiſh, that the plaintiffs were in the right. But the more it is argued, it is the leſs liable to diſpute. There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only queſtion is, has that event happened. But conditional contracts admit of a more liberal conſtruction. Now the only queſtion upon this contract is, Whether this ſhip has departed with convoy? A great deal muſt be referred to the uſage of merchants. The government appoints a convoy for the trade, and alſo names a place of rendezvous. Then comes the reference to the uſage of merchants; the voyage is begun at *Kingſton*; but the riſk only commences at *Bluefields*. Now though Lord *Rodney* deſires the captain of the *Glorieux* to take any ſhips he may pick up in his way, and convoy them to *Bluefields*; yet the warranty in the policy by the uſage, does not require convoy to *Bluefields*. The ſecond reference to the uſage of merchants is, What is eſteemed a convoy by merchants? *A convoy is a naval force, under the command of that perſon, whom government has appointed.* They truſt to the knowledge of government, which muſt be ſuppoſed to be better acquainted with the plans and force of the enemy, and with the ſtrength neceſſary to repel their attempts. Now this is the general uſage, to which matters of this kind are referred. Then let us ſee what the caſe is here.—Lord *Rodney* appoints Admiral *Graves* to go with ten ſail of the line to *Bluefields*; and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they take ſailing orders from the Admiral, *which are eſſential to convoy*, as by them they know the ſignals, for what places they are to ſteer, in caſe of diſperſion by ſtorm, or any other juſt cauſe (*a*). Admiral *Graves*, on the

See poſt. 446 *a*.

(*a*) Since the two former editions of this work, I have met with a caſe of *Veedon* v. *Wilmot*, at *Guildhall*, *July* 1744, in the time of Lord Chief Juſtice *Lee*, where the ſhip inſured had departed from *London*, and arrived at the *Downs* 22d *Auguſt*, where the *Grafton* and *Lenox* (the convoy) were under ſail, and the captain ſent one of his men on board for ſailing orders, which were refuſed; but the commodore ſaid, "*keep on*, "*and*

the 26th of *July*, for reaſons beſt known to himſelf, thinks he has got all the ſhips, for which he ought to ſtay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true, that it is in the power of the Commander in Chief to change the place of rendezvous, yet in this caſe it is not true, as was ſuppoſed in argument, that *Cape Anthonio* was appointed. At the time of ſailing from *Blueſields*, the *Glorieux* was no part of the convoy; for ſhe did not come there till two days after the fleet was gone. Upon theſe facts it did appear to me, and to the jury at the trial, that the warranty was not complied with: I continue of the ſame opinion now; and that this rule ſhould be diſcharged."

Mr. Juſtice *Willes*.—"I cannot perfectly coincide with every thing which Lord *Mansfield* has laid down. The form of the contract is in general words "*to depart with convoy*," without mentioning any particular day, or pointing out any ſpecific convoy. The terms of the policy ſeem to me to have been literally and ſubſtantially complied with; for there was no *laches* on the part of the *Arundel*; ſhe came with all poſſible expedition, and was at *Blueſields* two days before the time appointed for ſailing. When Captain *Mann* found that the fleet was gone, he did every thing in his power for the ſecurity of the ſhip; for he put himſelf under the protection of the *Glorieux*, which was appointed by Lord *Rodney* to make a part of the convoy: and it appears in evidence, that in every reſpect Captain *Cadogan* behaved as a convoy. I have ſearched a good deal for caſes; and I can only find one in *Strange*, 1250, upon the ſubject of failing orders; and I do not think that caſe goes ſo far as to ſay, that ſailing orders are eſſential to a convoy. The loſs of the *Arundel* happened long ſubſequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been ſubſtantially performed."

Vide poſt. P. 453.

Mr. Juſtice *Buller*.—"In deciding this caſe, it is not neceſſary to ſay, whether ſailing orders are eſſential or not: as at preſent adviſed, I do not ſay that they are abſolutely neceſſary. The

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"*and I will take care of you*;" and the ſhip being loſt that night by ſtriking on the ſhore, the queſtion was, If the ſhip was put under convoy, *having no ſailing orders?* And it was held ſhe was, and the plaintiff had a verdict. *Note to the third edition.*

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present question is simply this: Did the *Arundel* sail with convoy? This is a condition which must be literally complied with, as all the cases agree. As to the question itself, it is undoubtedly a question of fact: and the facts of the case seem to me to prove, that the *Glorieux* was no part of the convoy. Admiral *Graves* had sailed before they arrived; and that circumstance, which my Lord stated, seems very material, that no orders were left behind for the *Glorieux*. I say that, on this evidence, she was not a part of the convoy: for in order to make her so, it must appear that she was under the orders of *Graves*. Did he leave her behind to take care of the ships that remained? If so, it would alter the case very materially. But there was no such idea; for if there had, the *Glorieux* would have remained at *Bluefields* for the rest of the ships, until the 1st of *August*: on the contrary, Captain *Cadogan*, finding that Admiral *Graves* was gone, immediately followed; for his sole object was to join Admiral *Graves*. *Ships must sail under the convoy appointed by the government of the country*, who proportion the strength of it to the necessity of the times. To what end would this care be taken, if merchantmen were to sail under the protection of single ships, with which they may happen to meet? I am therefore of opinion, that if a ship do not sail with the convoy appointed by government, it is not a sailing with convoy, within the terms of the policy." The rule for a new trial was therefore discharged (*a*).

This question respecting the necessity of having sailing instructions from the commander of the convoy came on to be considered in the Court of Common Pleas, upon a motion for a new trial, when Mr. Justice *Buller*, in the absence of Lord Chief Justice *Eyre*, said, "Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. *In point of law, then, the general proposition is, that sailing instructions are necessary.* I have never decided this

Webb v. Thomson, 1 Bos. & Pull. 5.

Sittings at Guildhall before Mr. Just. Buller, after Easter Term 1784.

(*a*) Another action was brought upon the same policy against another of the underwriters; and although a verdict in that case was found for the plaintiffs: yet it seems to me to leave the doctrines above advanced unshaken: for upon the second trial it was proved, beyond all doubt, that the Glorieux was in truth a part of the convoy, a fact, which was left doubtful on the first; and it was upon that fact that Lord Mansfield and Mr. Justice Buller chiefly relied.

case

case myself, but it has often been determined at *Guildhall*. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert* v. *Pigou*, my expression is, "It is not necessary to say, whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." The case of *Victoria* v. *Cleeve* goes no further. If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy: but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited." The other judges concurred in this opinion.

See post. 453.

In a still later case, in an action on a policy of insurance on the ship *Potomack*, at and from *Jamaica* to *London*, warranted to depart with convoy from the place of rendezvous on or before the 1st of *August* 1705: it was admitted that the vessel never had got so near to the admiral, who had in fact left the place of rendezvous before the *Potomack* arrived there, as to obtain sailing orders, when he lost sight of the convoy, and was afterwards taken. The plaintiff's object was to get a decision upon the point, *How far sailing instructions were essential to the sailing with convoy?*

France v. Kirwan, Sittings at Guildhall after Mich. 38 Geo. 3.

See a very elaborate judgment of Lord Eldon on this point in the case of Anderson v. Pitcher, 1 Bos. & Pull. 264.

Lord *Kenyon* expressed the strong inclination of his opinion to be, that they were essential, but would not decide it, as this vessel had never *in fact* joined. The plaintiffs were nonsuited.

Although the decisions of the courts of common law require no additional authority to support them; yet it will be proper, merely by way of illustration, to point out to the reader, in what cases the opinions of foreign writers agree with the determinations of the *English* courts of justice. Monsieur *D'Emerigon*, a very distinguished *French writer* upon this branch of jurisprudence, puts this case: "On avoit fait des assurances sur "un navire, de sortie de *Marseille* jusq'aux Detroits de *Gibral-* "*tar*, et dans la police il étoit dit que le navire partiroit de "*Marseille sous l'escorte d'un batiment de roi; autrement, assurance*

1 Emerigon, p. 171.

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" *nulle.* Une fregate, chargée de munitions de guerre pour " *Algeſiras*, ſe trouvoit à *l'Eſtaque.* Le navire aſſuré mit à la " voile ſous les auſpices de cette fregate, qui lui accorda pro- " tection, et qui partit en meme temps. Conſulté ſur ce cas, " je fus d'avis que ſi le navire étoit pris par les ennemis, les aſ- " ſureurs ſeroinet fondés a refuſer le payment de là perte: *car* " *autre choſe eſt d'etre ſous l'eſcorte d'un batiment du roi, et autre choſe* " *eſt de naviguer ſimplement ſous ſes auſpices.*"

See the caſe.

From the caſe of *Hibbert* and *Pigou* we collect this; that a convoy appointed by the admiral commanding in chief upon a ſtation abroad, is a convoy appointed by government. And beſides the inſtruction it affords, applicable to the particular ſubject, for which it was here inſerted, it ſerves to eſtabliſh ſome principles laid down at the beginning of this chapter; that whether the loſs do or do not happen, on account of the breach of the warranty, ſtill the policy is forfeited: for in that caſe, the ſhip inſured periſhed in a ſtorm, long after ſhe had joined the regular convoy; and conſequently the loſs did not happen, on account of the breach of the condition.

Having ſeen what ſhall be deemed a convoy, let us proceed to conſider what ſhall be a *departure* with convoy, within the meaning of a warranty *to depart with convoy.* The rule on this point is ſhort and clear, that ſuch a warranty implies, that the ſhip ſhall go with convoy from the uſual place of rendezvous, at which the ſhips have been accuſtomed to aſſemble; as *Spithead*, or the *Downs*, for the port of *London*; and *Bluefields* for all the ports in *Jamaica.* And from the particular port to ſuch uſual place of convoy, the ſhip is protected by the policy.

Lethullier's caſe, 2 Salk. 445.

Thus in an action on a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, *warranted to depart with convoy*; the declaration ſtates, that the ſhip went from *London* to the *Downs*, *and from thence with convoy*, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, to which it was objected, That here was a departure without convoy.

Per Curiam.

The clauſe, warranted to depart with convoy, muſt be conſtrued according to the uſage among merchants; that is, from ſuch place, where convoys are to be had, as the *Downs*, &c.

It is true, Lord Chief Juſtice *Holt*, upon that occaſion, was of a different opinion; but the judgment of the other judges was relied upon, and confirmed in the following caſe by Lord Chief Juſtice *Lee*, and has alſo been recognized in ſeveral other caſes, in which the queſtion has come collaterally before the Court. Indeed, of late years, it has been tacitly acquieſced in; for there never was a convoy from the port of *London*.

On an inſurance from *London* to *Gibraltar*, *warranted to depart with convoy*, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The inſurers inſiſted, that this being the time of a *French* war, the ſhip ſhould not have ventured through the *Channel*, but have waited in the *Downs* for an occaſional convoy. And many merchants and office-keepers were examined to that purpoſe. But Lord Chief Juſtice *Lee* held, that the ſhip was to be conſidered as under the defendant's inſurance *to a place of general rendezvous*, according to the interpretation of the words, "warranted to depart with convoy." *Salk.* 443. And if the parties meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure with convoy from the *Downs*. The jury was compoſed of merchants, who found for the plaintiff, upon the ſtrength of this direction. Gordon v Morley, 2 Stra. 1265.

A ſimilar deciſion was made in the year 1781, by the Admiralty of *France*, which is reported in the work of *Emerigon*. Tom. 1. p. 186.

Upon this kind of warranty, it is to be obſerved, that although the words commonly uſed are, "to *depart* with convoy," or, "to ſail with convoy;" yet they extend to ſailing with convoy throughout the whole of the voyage, as much as if thoſe words were inſerted. Indeed to ſuppoſe the contrary would introduce an infinite variety of frauds; as a ſhip would ſail out of harbour with the convoy, continue with it for an hour or two, then leave it, and run every peril, at the riſk of the underwriter. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty; and the inſurer is diſcharged from his engagements. 2 Salk. 443.

This

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This was one of the points ruled in *Jeffreys* v. *Legendra*, that will be quoted at length presently, in which Lord Chief Justice *Holt* and the rest of the Court held, that although the words of the policy only were "to depart with convoy," yet they extend to sail with convoy throughout the whole voyage.

3 Lev. 320.

In a more modern case, however, this doctrine came again in question; and after very full consideration, the opinion of Lord *Holt* was unanimously confirmed by the whole Court of King's Bench.

Lilly v. Ewer, Doug. 72.

It was an action for money had and received, brought against an underwriter for a return of premium. The policy was on the ship the *Parker Galley*, "at and from *Venice* to the *Currant* "*Islands*, and at and from thence to *London*," at a premium of five guineas *per cent.* "to return 2 *per cent. if the ship sailed with* "*convoy from Gibraltar*, and arrived." The ship touched at *Gibraltar* on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, *but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre*, being ordered on the *Lisbon* station; and accordingly the ship and convoy separated, and the ship arrived safe at *London*. The only question in the case was, Whether, by the terms of the policy, the condition for the return of premium was a *departure from Gibraltar with such convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage?* The trial came on before Lord *Mansfield* and a common jury, when a verdict was found for the plaintiffs.

A rule having been obtained to shew cause why there should not be a new trial: the evidence from his Lordship's report appeared to be thus: That the plaintiffs had called witnesses (one of whom was Mr. *Gorman*, an eminent merchant) to prove that for some years past, when convoy *for the voyage*, or *the whole voyage* was intended, those explanatory words had been added, and that, by this usage, the expressions of "*sailing with convoy*," and "sailing with convoy for the voyage," had received distinct technical meanings: "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which

had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words "for the voyage," or "for *England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witnesses for the defendant swore, that they understood the words "with convoy," to mean, *convoy for the voyage*; and the broker said, that, at the time this policy was signed, he understood and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual, when convoy for the voyage was meant. His Lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the counsel to ask the opinion of the witnesses on the construction; but to learn whether there was any usage in this case, which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury. CHAP. XVIII.

The case was fully argued at the bar.

Lord *Mansfield*.—"On the words I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy, which might be designed to separate from the ship in a minute or two; though when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident, to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy should continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause; because the sense contended for by the plaintiffs, was not inconsistent with the words of the policy, and therefore it was material to see what the usage was. I laid great stress on Mr. *Gorman*'s testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiff's witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms. It may be hard, because

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cauſe words have been added in ſome inſtances, to force a conſtruction in this caſe, from the omiſſion of them. The queſtion is of great importance."—The rule therefore was made abſolute.

Doug p. 74. note (7).

The new trial came on before Lord *Mansfield* at the ſittings after *Trinity* term, 19 *Geo.* 3. when the verdict was found for the defendant, the inſurer.

Doug. 73. 1 Emerigon, 166.

But although it has been thus ſettled, that a ſhip muſt depart with convoy for the whole of the voyage; yet in the laſt caſe, it was truly ſaid by Lord *Mansfield*, that an unforeſeen ſeparation is an accident, to which the underwriter is liable. It is the law of reaſon and common ſenſe; for it would be the height of injuſtice and cruelty to heap misfortune upon misfortune, and to ſay, that becauſe a ſhip has been ſeparated from her convoy by ſtreſs of weather, or the fury of the elements (perils inſured againſt by the policy), that the inſured ſhall ſuffer ſtill greater miſery, by being deprived of that indemnity which he had ſecured to himſelf by paying a ſufficient and adequate premium. The law of *England* does not tolerate ſuch principles: and the firſt deciſion upon the ſubject was ſuch, that it never has been departed from in any inſtance.

Jefferey v. Legendra, 3 Lev. 320. 2 Salk. 443. Carth. 216. 1 Show. 320. 4 Mod. 58. S. C.

Aſſumpſit on a policy of inſurance made in the uſual form, "from *London* to *Cadiz*, warranted to depart with convoy." Upon the general iſſue pleaded, the jury found a ſpecial verdict, ſtating, that the ſhip did depart from the port of *London*, in company of the convoy intended, and ſailed together as far as the *Iſle of Wight*, in purſuance of the voyage towards *Cadiz*; and there they were ſeparated by ſtreſs of weather; that the convoy put into *Torbay*, and the inſured ſhip into the port of *Fowey* in *Cornwall*. That three days afterwards, the wind ſetting right to bring the convoy down the channel, the maſter of the inſured ſhip ſailed out of *Fowey* on purpoſe to meet the convoy; but it did not come: and then the inſured ſhip was ſeized with another ſtorm, ſo that ſhe could not return from whence ſhe came, but was driven upon the *French* coaſt, and there taken by the enemy.

Carth. 216.

After ſeveral arguments of this ſpecial verdict, the plaintiff had judgment *per totam curiam*; and their principal reaſon was, becauſe there was no manner of neglect, or other default found in

in the maſter of the ſhip; but it appeared he had done all in his power to keep in company of the convoy. It is found expreſsly, that he departed with convoy from his firſt port, which anſwers the words of the policy: but it would have been otherwiſe, if any fraud or neglect had been found in the maſter of the inſured ſhip after his departure, notwithſtanding he departed out of the firſt port with convoy; for the meaning of the words "*warranted to depart with convoy*" is, that the inſured ſhip ſhould keep company with the convoy, during the whole voyage, if poſſible.

Even where the ſhip has by tempeſtuous weather been prevented from joining the convoy at all, at leaſt, of receiving the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy, within the terms of the warranty.

As to this point, ſee the caſes ante, p 443. et. ſeq. and probably ſome doubt may ariſe as to the following caſe.

The plaintiff had inſured on goods in the *John* and *Jane*, from *Gottenburgh* to *London*, with a warranty *to depart with convoy* from *Fleckery*. In *July* 1744, the ſhip ſailed from *Gottenburgh* to *Fleckery*, and there ſhe waited for convoy two months. On the 21ſt of *September*, at nine in the morning, three men of war, who had one hundred merchant ſhips in convoy, ſtood off *Fleckery*, and made a ſignal for the ſhips there to come out, and likewiſe ſent in a yaul to order them out. There were fourteen ſhips waiting, and the *John* and *Jane* got out by twelve o'clock, and one of the firſt; the convoy having ſailed gently on, and being two leagues a-head. It was a hard gale, and by ſix in the afternoon, the ſhip came up with the fleet; but could not get to either of the men of war for ſailing orders, on account of the gale of wind. It was ſtormy all night, and at day-break the ſhip in queſtion was in the midſt of the fleet; but the weather was ſo bad, that no boat could be ſent for ſailing orders. A *French* privateer had ſailed amongſt them all night: and it being foggy on the 22d, attacked the *John* and *Jane* about two, who kept a running fight till dark, which was renewed the next morning, when ſhe was taken. For the defendant it was inſiſted, that this ſhip was never under convoy, nor is ever conſidered ſo, till they have received ſailing orders; and if the weather would not permit the captain to get them, he ſhould have gone back.

Victoria v. Cleeve, 2 Stra. 1250.

But

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Sir William Lee.

But the Chief juſtice and the jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and thoſe agreements are never confined to preciſe words; as in the caſe of departing with convoy from *London*, when the place of rendezvous is *Spithead*, a loſs in going thither is within the policy. So the plaintiff recovered.

But it is evident from all that has been ſaid, that if there be an opportunity of convoy; if the convoy throw out repeated ſignals to join; and by the negligence and delay of the captain of the inſured ſhip, the opportunity be loſt, the warranty to depart with convoy is not complied with, and the underwriter is diſcharged.

Taylor v. Woodneſs, Sittings at Guildhall, Hil. Vac. 4 Geo. 3.

Thus in an action on a policy of inſurance tried before Lord *Mansfield*, the plaintiff was nonſuited, there being a warranty to depart with convoy; and it appearing from the evidence, that the commodore of the convoy had made ſignals for ſailing from *Spithead* to *St. Helen's* the night before, and had made repeated ſignals the next morning from ſeven o'clock till twelve, notwithſtanding which, the ſhip inſured had neglected to ſail with him, and did not ſail till two hours after, in conſequence of which ſhe was taken by a privateer (*a*).

Although we have thus ſeen, that a ſhip muſt not voluntarily depart from convoy during the voyage (*b*), yet this ſpecies of warranty muſt always be conſtrued with reference to the uſage of trade, and to the orders of government. For if the courſe upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy to eſcort the trade of a place to a given latitude and no farther; and there be no other convoy on that ſtation, a veſſel, taking the advantage of ſuch a convoy, has complied with the warranty to ſail with convoy for the voyage.

Smith v. Readſhaw, London, Sittings aft. Eaſt. 1781.

Thus in an inſurance on the ſhip William, "*at and from London to Jamaica,*" *warranted to depart with convoy for the voyage,*

(*a*) As to the duty of the officers appointed for convoy to merchant ſhips, ſee it preſcribed in the ſtat. of the 13 Car. 2. ſt. 1. c. 9. art. 17., which regulations were confirmed by the 22d of Geo. 2. c. 33. ſ. 2. art. 17.

(*b*) This is now prohibited by ſtatute. See poſt. p. 456.

Lord

Lord *Mansfield*, in the course of his summing up to the jury, said, "A warranty to sail with convoy means with such a convoy as government pleases to appoint; and whether it consists of separate ships at different stations or not, it is a convoy for the voyage; therefore on that point there is no doubt."

De Garay v. Clagget, London, Sit. after Mich. 1795.

The same doctrine was held by Lord *Kenyon*, in an action on a policy of insurance *at and from Cadiz to Amsterdam, warranted to sail with convoy for the voyage*. The ships insured had sailed from *Cadiz* under a *British* convoy; and were lost before they reached the *Downs*, where it was alleged they were to have taken a fresh convoy for *Amsterdam*. The underwriters insisted that the convoy should have been direct to *Amsterdam*. The assured, on the other hand, contended, that all convoy must be according to usage, and that in many voyages there is no such thing as a direct convoy, but that the vessels proceed by relays of convoy from stage to stage. The special jury, with Lord *Kenyon*'s approbation, gave a verdict for the plaintiffs. And although in that case, it is true, the underwriter had adjusted the policy *with full knowledge* of all the circumstances, which his lordship seemed to think conclusive, yet there were other causes on the same policy, where there was no adjustment; and upon Lord *Kenyon* and the jury declaring that, without considering the adjustment, they thought the warranty had been complied with, the plaintiff had a verdict, and no motion was ever made for a new trial in any of these causes.

D'Eguino v. Bewicke, 2 H. Black. 551.

So also the Court of Common Pleas decided in an action on a policy on the ship *Little Betsey*, at and from *London* to *St. Sebastian, warranted to sail with convoy*. The ship sailed with other vessels under convoy of several ships of war: and after a certain latitude, the *Weazel*, one of the men of war, was detached to convoy the *Spanish* ships; but the captain of that ship had orders to go with the *St. Sebastian* ships no further than *Bilboa*, and in fact he went no farther. A verdict passed for the plaintiff. When the case came on before the Court on a motion for a new trial, it was argued for the underwriters, that warranties are to be strictly complied with; and that however near the port of *St. Sebastian* might be to *Bilboa*, yet the principle was the same; and that a convoy to the latter place could no more be construed to be a convoy to the former, than a convoy to the *Cape of Good*

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Hope could be a convoy to the *Eaſt Indies*, and for this was cited *Hibbet* v. *Pigou* (ſupra 443).

Mr. Juſtice *Buller*.—"The caſe of *Hibbert* and *Pigou* is not applicable to this, for there a convoy was appointed and actually ſailed from *Jamaica* to *England*; as to the inſtance put at the bar of a convoy to the *Cape of Good Hope*, I entirely differ from the counſel on that point; for if government thought a convoy to the *Cape* was a ſufficient protection to the *Eaſt India* trade, and the uſage were for the *Eaſt India* ſhips to ſail with a convoy only to the *Cape*, and to conſider that as the *Eaſt India* convoy, and no other convoy was appointed to the *Eaſt Indies*, I ſhould hold that the warranty was complied with; though I agree if there was another convoy to the *Eaſt Indies*, it would be otherwiſe. The captain of a merchant ſhip has nothing to do with, nor can he know the inſtructions from the Admiralty to the king's officers, but muſt take ſuch convoy as he finds. I am therefore of opinion that there is no ground at all for this motion."

Mr. Juſtice *Heath*.—"I am of the ſame opinion. The owner of a ſhip, when he makes an inſurance, cannot know the orders of the Admiralty reſpecting convoys."

Mr. Juſtice *Rooke*.—"The ground ſtated at the bar ſeems to me to be more fit for the jury than the Court, and the jury have found that the convoy was ſufficient."

Lord Chief Juſtice *Eyre*.—"I am ſatisfied with the finding of the jury,"

The rule for a new trial was therefore refuſed.

The ſailing with convoy has added ſo much to the ſecurity of our commerce in time of war, that in the year 1798, an act of parliament paſſed for the purpoſe of compelling ſhips to ſail with convoy, and by which alſo a conſiderable revenue was intended to be raiſed.

38 Geo. 3. c. 76.

Sect. 1.

The firſt ſection of this act provides, that it ſhall not be lawful for any ſhip or veſſel belonging to any of his majeſty's ſubjects (except as therein-after is excepted) to ſail or depart from any

any port or place whatever, unleſs under the convoy and protection of ſuch ſhip or ſhips as may be appointed for the purpoſe.

Sect. 2. That the maſter or other perſon having the charge or command of every ſuch ſhip or veſſel, which ſhall ſail or depart under the protection of convoy, ſhall and is thereby required to uſe his utmoſt endeavours to continue with ſuch convoy during the whole of the voyage, or during ſuch part thereof as ſuch convoy ſhall be directed to accompany and protect ſuch ſhip, and ſhall not wilfully ſeparate or depart therefrom upon any pretence whatever, without order or leave for that purpoſe from the officer having the command of ſuch convoy.

Sect. 3. It is alſo enacted that if the maſter or commander of any ſhip which is by this act required not to ſail without convoy, ſhall ſail without convoy; or having ſailed with convoy ſhall wilfully depart therefrom, without leave firſt obtained from the perſon entruſted with the charge of ſuch convoy, every ſuch maſter ſhall forfeit 1000*l.* and in caſe the whole or any part of the cargo conſiſted of naval or military ſtores, the penalty is 1500*l.* with a power in the Court, where the action may happen to be brought, to mitigate the penalties, ſo as they are not reduced to a leſs ſum than 50*l.*

Sect. 4. By ſection the fourth, it is provided that in caſe of a ſailing without, or a wilful deſertion of, convoy, every inſurance or contract or agreement for any inſurance upon ſuch ſhip, or goods, wares or merchandize laden thereon, or upon any property, freight, or other intereſt ariſing out of the ſame, whereon inſurances may lawfully be made (and which ſhall be the property of the maſter or commander of the ſhip, ſo ſailing without convoy, or wilfully quitting the ſame, or of any perſon intereſted in ſuch veſſel or cargo, who ſhall have directed, or been any way privy to, or inſtrumental in, cauſing ſuch ſhip or veſſel to ſail without convoy, or wilfully to ſeparate therefrom), ſhall be null and void, to all intents and purpoſes both at law and in equity, any contract or agreement to the contrary notwithſtanding; and that nothing ſhall be recovered thereon by the aſſured for loſs or damage, or for the premium, or conſideration in nature of a premium, which ſhall have been given for ſuch inſurance: and

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if any party to such insurance, or any broker or other person shall transact a settlement on such insurance, or allow any money in account, on such insurance, every such person shall forfeit 200*l.*

Sect. 5. It is also provided, that the officers of the customs shall not permit vessels to clear outwards, till they have given bond, with one surety, in the penalty of the value of the ship, with condition that the ship shall not sail without, nor wilfully desert the convoy.

Sect. 6. 28 June 1798. A foreign-built ship, British owned, is not required to be registered, and may therefore sail without convoy, being within the exception in this clause of the statute. Long v. Duff, 2 Bos. & Pull. 209.

By the sixth section, this act is not to extend to vessels, not required to be registered by any acts then in force; nor to any ship, having a licence signed by the Lords of the Admiralty to sail without convoy, or by such persons as shall be duly authorized by them for that purpose; or to any ship proceeding with due diligence to join convoy from the port or place at which the same shall be cleared outwards, in case such convoy shall be appointed to sail from some other port or place, except as to the bond hereby required to be taken upon the clearance outwards; or to any ship bound to or from any port in *Ireland*; or to ships bound from one port to another in *Great Britain*; nor to ships in the service of the *East India*, or *Hudson's Bay*, companies.

Sect. 8. By the eighth section, the act is not to extend to ships sailing from foreign ports, in case no convoy is appointed by the Lords of the Admiralty of *England*, or persons authorized by them at such foreign ports to appoint convoys, or to grant licences for sailing without convoy.

Sect. 9. The Lords of the Admiralty are to give notice in the *Gazette* that masters of ships shall have on board, flags and vanes for the purpose of distinction, and of answering signals; and without having which they are not to be cleared outwards.

Sect. 10. So much of the act of the 33 *Geo.* 3. ch. 66. sec. 8. as makes the masters of ships under convoy liable to be articled in the Court of Admiralty for disobeying signals or other lawful commands of the commodore, or deserting convoy, and finable at the discretion of the said court, in any sum not exceeding 500*l.* and punishable by imprisonment, not exceeding one year, shall

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be painted on a board, and affixed on ſome conſpicuous and convenient part of every ſhip which by this act is required not to ſail or depart without convoy; and that in default thereof every maſter or other perſon, having the charge or command of any ſuch ſhip, ſhall forfeit, for every ſuch offence, the ſum of 50*l.*

Sect. 11. The eleventh ſection directs, that if any ſhip, required by this act not to fail without convoy, ſhall be in imminent danger of being taken by the enemy, the commander of the ſhip ſhall make ſignals by firing guns to convey information of his danger to the reſt of the convoy, as well as to the ſhips of war under the protection of which he is ſailing; and that in caſe he is taken poſſeſſion of, he ſhall deſtroy all inſtructions confided to him, relating to the convoy; and every commander wilfully neglecting to make ſuch ſignals, or to deſtroy ſuch inſtructions, ſhall, for every ſuch offence, forfeit a ſum not exceeding 100*l.*

The remainder of this ſtatute is employed in directing how the duties ſhall be raiſed and collected.

The third and laſt ſpecies of warranty, which falls under our conſideration, is that of neutrality; or that the ſhip or goods inſured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is abſolutely void *ab initio*, on account of fraud. This ground was entered upon in the chapter of fraud; and the principle, on which the difference turns, is this. A man may warrant that his ſhip ſhall ſail with convoy; and if that condition be not complied with, it is not his fault, becauſe it depends upon the acts of other men: but ſtill he is the ſufferer, for he loſes the benefit of his contract. So alſo if he warrant to ſail on a particular day, and do not, he is guilty of no crime; for that was a circumſtance, the performance of which depended on a thouſand accidents, ſuch as wind, weather, repair, *&c.*: but as he had expreſsly undertaken, he loſes the effect of his policy by non-compliance. But in neither of theſe caſes, as I have ſaid, is the inſured, making ſuch a warranty, guilty of any offence. Not ſo with him, who warrants property to be neutral, That is a fact, which, at the time of inſuring, muſt be within his own knowledge; and if he aſſert it to be neutral, knowing it

Vide c. 10.

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to be otherwiſe, he is guilty of a wilful and deliberate falſhood, and incurs moral turpitude. In ſuch a caſe, therefore, the contract between the parties is abſolutely null and void to all intents and purpoſes.

Woolmer v. Muilman, 4 Burr. 1419. 1 Blac. Rep. 427. Vide ante, p. 244.

Thus on a ſpecial caſe reſerved for the opinion of the Court, it appeared that an action was brought for the recovery of a total loſs on a policy of inſurance made on goods, on board the ſhip *Bona Fortuna*, at and from *North Bergen* to any ports or places whatſoever, until her ſafe arrival in *London* "*warranted neutral ſhip and property.*" The ſhip, with the goods ſo being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was, by force of the winds, and ſtormy weather, wrecked, caſt away, and ſunk in the ſeas; and the ſaid goods were thereby wholly loſt. The ſhip called *La Bona Fortuna*, at and before the time ſhe was loſt, *was not neutral property*, as warranted by the ſaid policy. The queſtion was, Whether under ſuch circumſtances, the plaintiff could recover? Lord *Mansfield*, after hearing counſel for the plaintiff, ſtopped thoſe for the defendant, ſaying, the point was too clear to be argued. There was a falſhood, with reſpect to the thing inſured; for he inſured neutral property, when it was not ſo: therefore there *is no contract*. We muſt give judgment for the defendant.

Tabbs v. Bendelack, Sitt. after Tr. 1801. 4 Eſp. 108. and 3 Boſ. & Pull. 207. note. S. C.

An *American* by birth, who has reſided for ſome years with his family in *England*, though himſelf has been occaſionally in *America*, is ſo far to be conſidered as a *Britiſh* ſubject, that if a ſhip of his be warranted *American* property it is not to be deemed ſo, though the veſſel was built in *America* and regiſtered there, and ſuch a plaintiff in an action upon a policy of inſurance was nonſuited.

If, however, the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutral property; becauſe it is impoſſible for the inſured to be anſwerable for the conſequences of a war breaking out during the voyage. The inſurer takes upon himſelf the riſk of peace or war; they are public events, equally known to both parties.

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Eden and another v. Parkinſon, Doug. 732.

The plaintiffs inſured the ſhip the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*, *warranted a* "*neutral ſhip and neutral property.*" The ſhip being captured in the courſe of her voyage by ſome *Engliſh* men of war, the plaintiffs brought this action againſt the defendant, one of the underwriters on the policy, ſtating in their declaration, that the defendant ſubſcribed the policy on the 28th of *November* 1780, and averring that the ſhip and cargo were *at that time*, neutral property. The trial came on before Lord *Mansfield* at *Guildhall*, when a verdict was found for the plaintiffs, ſubject to the opinion of the court upon a caſe ſtating, that the ſhip in queſtion ſailed from *L'Orient*, on the voyage inſured, on the 11th of *December* 1780, having the inſured cargo on board, *and both the ſhip and cargo were neutral property at the time of the ſhip's departure from L'Orient*, and ſo continued until the 20th of *December* 1780, on which day hoſtilities having commenced between the *Engliſh* and the *Dutch*, the *Dutch* ceaſed to be a neutral power, and the ſhip and cargo ceaſed to be neutral property. They were taken on the 25th of *December* 1780, and condemned as lawful prize, in the Admiralty court, on the 19th of *February* 1781.

Lord *Mansfield*.—"Many points have been gone into in the argument on both ſides at the bar, which are not neceſſary for the deciſion of this caſe. For inſtance, there is no doubt but you may warrant a future event. But the ſingle queſtion here is, What is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* preſſed for a caſe, and I granted one out of reſpect to him. What is the caſe? It is an inſurance upon a ſhip and her cargo, at and from *L'Orient* to *Rotterdam*. The inſured warrant them neutral, and the defendant would have the court to add, by conſtruction, "and ſo ſhall continue during the whole voyage." The contract is not ſo. The inſured tell the ſtate of the ſhip and goods *then*, and the inſurers take upon themſelves all future events and riſks, from men of war, enemies, detentions of princes, &c. The parties themſelves could not have changed the nature of the property; but they did not mean to run the riſk of the war. If it made a difference what country the property belonged to, the underwriters ſhould have enquired. The riſk of future war is taken by the underwriter of every policy. By an implied warranty every ſhip muſt be tight, ſtaunch, and

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ſtrong; but it is ſufficient if ſhe be ſo at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the underwriter will continue liable. The caſe of *Lilly* v. *Ewer* turns quite the other way. The deciſion there was, that the ſhip muſt ſail with convoy, according to the uſage of the trade; that is, convoy deſtined to go as far as uſual in that voyage. The preſent is the cleareſt caſe that can be. The warranty is, that things ſtand ſo at the time; not that they ſhall continue."

Vide ante, c. 11.

Vide ſupra.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Mr. Juſtice *Buller*.—"The caſe of *Lilly* v. *Ewer* is much againſt the defendant, for it was not contended there that the ſhip muſt *continue* with the convoy during the whole voyage." The *poſtea* was delivered the plaintiffs.

Vide infra.

And afterwards in a ſubſequent caſe of *Saloucci* v. *Johnſon*, in the courſe of the argument, Mr. Juſtice *Buller* ſaid; I do not agree with the counſel, who contend, that the property muſt continue neutral during the whole voyage: if it be neutral at the time of ſailing, and a war break out the next day, the underwriter is liable.

Tyſon and another v. Gurney, 3 TermRep. 477.

And in a ſtill later caſe, which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongſt others ſaved for the opinion of the Court of King's Bench. But when the caſe came on to be argued, the counſel for the defendant abandoned the objection upon the authority of *Eden* v. *Parkinſon*; and *Saloucci* v. *Johnſon*; ſo that this point may now be conſidered as for ever cloſed.

Having ſeen what ſhall be deemed a compliance with a warranty, aſſerting that the property inſured is neutral; and having alſo conſidered what effect the breach of ſuch a warranty has upon the contract of inſurance; it may be proper to obſerve, before this chapter is cloſed, how far our courts of law hold the ſentences of foreign courts to be concluſive evidence, that the property was not neutral; ſo as to diſcharge the underwriters.

Before we proceed to the conſideration of the effect of their ſentences, it is proper to obſerve, that the foreign courts here

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alluded to, the sentences of which are in any case to be held conclusive, must be such courts as are constituted according to the law of nations, exercising their functions within the belligerent country; a court of that state, to which the captor belongs, held within its own territories. If therefore a *British* ship be captured by a *French* privateer, and carried into *Bergen* in *Norway*, a neutral state, and there condemned by the *French* consul, the sentence is contrary to the law of nations, and illegal; and if after such a sentence, the owner re-purchase his ship at a publick auction, he cannot recover the re-purchase money from the underwriter. Such a contract is in the nature of a ransom, and illegal. The court of King's Bench, in deciding the above point, said, it was a question affecting all commercial states, and the point had lately been solemnly decided by Sir *William Scott* (the Judge of the High Court of Admiralty), upon grounds that would recommend the decision to all those who filled judicial situations (*a*).—It is certain, indeed, that the decision of a *French* consul in a neutral country can only be considered as the act of a person destitute of all authority, except over the subjects of his own country, and possessing that, merely by the indulgence of the country in which he resides; and who can have no pretence to exercise a jurisdiction in that neutral country in any matter, particularly in the matter of prize of war, in which the subjects of other states may be concerned.

Havelock v. Rockwood, 8 Term Rep. 268.

See the case of *Flad Oyen* Dr. Robinson Cas. in the Admiralty, v. 1. p. 135.

But sentences of condemnation procured by the captors in the country of a co-belligerent, or ally in the war, have been held to be good.

Oddy v. Bovill. 2 East's Rep. 473.

But of the sentences of foreign courts of Admiralty, duly constituted, the courts of justice in *England* will take notice; and if they have proceeded to decide the question of property will be held to be conclusive.

Hughes v. Cornelius, 2 Show. 232. 2 Ld. Raym. 893. 936.

(*a*) It was my intention to have inserted the very learned judgment of Sir *Wm. Scott*, in the case of the *Flad Oyen* at length: but I forbear to do so, as it is now published at length in the 8 Term Rep. p. 270. note (*a*); and also a full report of the cause in Dr. *Robinson*'s late valuable and accurate Reports of Cases argued and determined in the High Court of Admiralty. See also the case of the *Christopher*. 2. *Rob.* 209. and the case of the *Betsey, Kruger*. 2 *Rob.* 210, *n.* for the distinction between a condemnation in a neutral country, and one in the country of a co-belligerent, and which distinction was adopted by the Court of King's Bench in the case of *Oddy* v. *Bovill* mentioned in the text.

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In the first case as to the effect of foreign sentences upon the contract of insurance and warranties therein contained, it was held, that the sentence of condemnation by a foreign court of Admiralty is not conclusive evidence, that the ship was not neutral; unless it appear that the condemnation went upon that ground: consequently the underwriter remains liable. A sentence of a court of Admiralty binds all the world, as to every thing contained within it; but where the cause of condemnation does not appear to be on the specific ground material to the point in issue, evidence must be admitted in order to explain it.

Bernardi v. Motteux, Doug. 575.

Insurance of freight and goods was made upon the ship the *Jane* (or *Joanna*) at and from *Venice* to *London*, "*warranted* "*neutral ship and neutral property.*" The cause was tried before Lord *Mansfield*, at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court, upon a case which stated as follows: That the defendant underwrote the policy; that the ship was taken by a *French* frigate, called *La Magicienne*, as she was sailing from *Venice* on her voyage to *London*; that the plaintiff offered to give evidence on the trial, that the property of the ship and the property of the cargo were *neutral*; and that the papers belonging to the ship *fell overboard by accident*, after she was brought to by the *French* frigate: but the defendant objected to such evidence being received; and he produced as the ground of his objection the sentence of the condemnation of the ship in the *French* Admiralty Court, which was read, and is as follows:

Almeria, "The Joanna."

"*Louis Jean Marie de Bourbon, Duke de Penthievre*, Admiral "of *France*. Seen by us, the *procés verbal*, made on board the "snow *Joanna*, taken by the king's frigate *La Magicienne*, com- "manded by M. *De Boades*, dated the 2d of *December* last. "Signed *Saint Owey*, steward, *Bouret*, *Dominico Zané* Seen "by the captain commander. Signed *Boades*;—purporting that "the said 2d of *December* last, at five o'clock in the evening, "his said majesty's frigate, *La Magicienne*, commanded by the "said captain *De Boades*, being ten leagues east of *Cape de Mou-* "*lines*, having discovered a snow steering south-south-west, the "wind south-west, and having come up with her, and stopt her, "*under Venetian colours*, after an hour's chace, the said M. *De*

"*Boades*

" *Boades* ordered the captain to bring on board his muſter roll, " paſſport, and bills of loading; with which order the captain " did not readily comply, under a pretence that the ſea was " rough, and that his long boat was leaky; but, being at laſt " obliged to comply, upon threats being made of firing on him, " and being come on board, he declared, *that, in getting up the " ſhip's ſide, the box containing his muſter-roll, his patents, and " paſſport, had fallen from his pocket into the ſea,* and only ſhewed " his bills of loading; by which they found the ſaid ſnow, the " *Joanna*, of 14 men, including officers, commanded by *Domi- " nico Zané of Venice, ſailed from Venice the 25th of September, " with a cargo of* 12 bales of ſilk, dried raiſins, oil, &c. and " other effects mentioned in the bills of loading by him exhi- " bited, for the *account of ſundry perſons in Venice, conſigned to " ſundry perſons in London, whither he was bound.* Theſe *goods " going into an enemy's country*, and the loſs of his *papers*, which " *had fallen into the ſea, raiſing ſuſpicions;* the ſaid ſnow had been " ſtopped, and carried by his majeſty's frigate, *La Magicienne*, " to *Almeria*, where ſhe had been put into the hands of the " conſul, after the ſaid *Saint Owey*, lieutenant, acting as ſteward, " and the ſaid *Bouret*, enſign on board the ſaid frigate, had put " their ſeal on the ſaid ſnow, where they found no papers; and " taken on board the ſaid ſhip ten of the ſaid ſnow's crew, which " were replaced by ſix men from on board the *Magicienne*, and " three from the *Atalante*, with a coaſting pilot, who have " brought the ſaid ſnow into the port of *Almeria*. *The premiſes " conſidered*, We, by virtue of the power delegated to us as " aforeſaid, have declared, and declare, as good prize, the ſhip " the *Joanna*, her tackle, and apparel, together with the goods " of her cargo, and do adjudge them to the captors; that, in " conſequence of this decree, the whole be ſold (if not already " done) in the uſual manner, and the produce divided according " to the deſire and ordinance of the king; made the 28th of " *March* 1778. We order, by theſe preſents, the vice conſul " of *France*, at *Almeria*, to look to the execution of this our " ordinance; and hereby authorize and command the firſt tip- " ſtaff, or ſerjeant, to proceed in all forms requiſite thereto. " Done at *Paris* the 13th of *January* 1779, *Rigot*." The queſtion ſtated for the opinion of the court was, Whether the ſaid ſentence was not concluſive evidence againſt the plaintiff's re- covering in this action? In the courſe of the arguments, the

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third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and alſo the *procés verbal*, made at the time of the capture, though not ſtated in the caſe, nor given in evidence at the trial, were ſo much referred to, and ſeemed of ſuch weight to the court, that it will be neceſſary to inſert them in this place. Arret *for the regulation of the marine, &c.* 26th *July* 1778. Art. 3. "All veſſels taken, of what nation ſoever, "either neutral or allied, from which it is known that *any pa-* "*pers* have been *thrown* into the ſea, ſuppreſſed or abſtracted, "ſhall be declared good prize; together with their cargoes, "upon the mere proof, that *ſome papers* have been *thrown* into "the ſea, without any neceſſity of examining what thoſe papers "were; by whom they were thrown; and even though a ſuffi- "cient quantity ſhould remain on board to *juſtify* that the ſhip "and the cargo belonged to friends or allies." The *procés verbal* need not be here repeated; for although it is not ſubſtantively ſet out in the caſe, yet it is copied almoſt *verbatim* in the ſentence of the *French* Admiralty. It was admitted at the bar, that the ſentence had been appealed from, and had been affirmed; but nothing new or ſpecial appeared in the proceedings on the appeal. This caſe was twice argued at the bar; and after the ſecond argument, the Court deſired that it might ſtand over, in order to give time to apply to the defendant for his conſent; that the above *arret* and the *procés verbal* ſhould be added to the caſe. To this propoſition the defendant would not conſent.

Lord *Mansfield*, upon the firſt argument ſaid:—"The firſt principles are clear and admitted. All the world are parties to a ſentence of a court of Admiralty. Here there is a monition publiſhed at the Exchange; and in other countries, at ſome place of general reſort; and any perſon intereſted may come in and appeal at any time, if there has been no *laches*. If there has, the time of appeal is limited. But the ſentence, as to that which is within it, is concluſive againſt all perſons, unleſs reverſed by the regular court of appeal. It cannot be controverted collaterally, in a civil ſuit. The difficulty here is, what the ground was, on which the *French* Admiralty went; whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime laws of all countries, throwing papers overboard is conſidered as a ſtrong preſumption of enemy's property; and upon that principle the *arret* of 1778

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is founded. But in all my experience in *England*, I have never known a condemnation on that circumſtance only. It is made uſe of as a ſtrong ground of ſuſpicion. The *arret* is very rigid. It is difficult to find out what the ground of this ſentence was. *I incline* to think the Court went upon the ground of *enemy's property*, and conſidered the want of the papers as a ſtrong preſumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and, upon the whole, enough does not appear on this obſcure ſentence, to aſcertain preciſely on what it was founded, and ſome other method ought to be taken to enquire what the ground of it was. As to whatever it *meant* to decide, we muſt take it to be concluſive."

Willes and *Aſhhurſt*, Juſtices, concurred with his Lordſhip.

Mr. Juſtice *Buller* inclined to doubt, and ſaid: —"To be ſure, the ſentence was obſcure, but, taking it altogether, he did not think there was much difficulty in diſcovering the grounds of it. The two circumſtances, of the cargo being conſigned to the enemy, and the falling of the papers into the ſea, are ſtated as the grounds of ſuſpicion. The latter circumſtance,—papers falling into the ſea,—could not be a ground of condemnation. The other could raiſe no other ſuſpicion, nor a preſumption of any thing elſe, but the property being enemy's property. It follows therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing of papers overboard*, *that* would have been ſtated ſubſtantively as the ground. In the firſt place, lay the *arret* out of the caſe; and then wilful throwing papers overboard is only preſumptive evidence of enemy's property. Then take the *arret*, ſtill wilful throwing overboard might have been uſed as evidence of enemy's property, or it might have been a ſubſtantive ground under the *arret:* here it is not ſtated as a ſubſtantive ground."

Lord *Mansfield*, after the ſecond argument, ſaid; that if the *procés verbal* ſhould be agreed to be made part of the caſe, it would clearly explain the ambiguity of the ſentence; as it ſet forth the ground for taking the ſhip to have been the *arret* of *July* 1778. Without the *procés verbal*, he ſaid, the ſentence was equivocal; it took all in; and it was difficult to ſay what it went on. If the papers produced to the captor were fair, the pro-

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property was neutral. But the *procés verbal* put the ground of the ſentence out of all doubt.

Mr. Juſtice *Buller* alſo declared, that he thought the *procés verbal* muſt be taken as part of the proceedings, and, as that expreſsly referred to the *arret*, as the ground of the capture, and the ſentence was conſiſtent with it, the ſentence muſt be taken to be founded on the *arret*. But he adhered to his former opinion, *on the caſe as ſtated without the procés verbal*, namely, that the interpretation of the ſentence, taken by itſelf, muſt be, that the condemnation went on the ground of enemy's property, and was, therefore, concluſive againſt the plaintiff.

The final refuſal of the defendant was ſignified by Mr. *Lee*, who aſſigned as a reaſon for it, that the *procés verbal* was not a proceeding in the *French* court of Admiralty, but merely an account of what paſſed on the capture, reduced into writing, at the time. He alſo obſerved, that, in the ſentence, all the *procés verbal*, *except* the concluding part, which refers to the *arret* of *July* 1778, was recited, and this afforded a ſtrong argument for inferring, that the Court had purpoſely omitted that part of it, to ſhew that they did not condemn the ſhip on the ground of the *arret*.

Lord *Mansfield* diſapproved much of the defendant's refuſal, but he ſaid, he thought the juſtice of the caſe might ſtill be got at, on the ground of the ambiguity of the ſentence, which did not mention a word about the property *being enemy's property*; that it was clear the *French* Admiralty meant to proceed on the ground *of throwing the papers overboard*: and he agreed with the counſel for the plaintiff, that the *procés verbal* ought to be conſidered as part of the proceedings, and that the ſentence ought not to have been read without it.

Mr. Juſtice *Buller* thought there was weight in what had been obſerved by Mr. *Lee*, on the reaſon for omitting the concluding part of the *procés verbal* in the ſentence. Indeed, it was not clear that what was now offered to be produced, was the ſame *procés verbal* which the ſentence recites; and if it could be ſuppoſed that the captain had made another, omitting the reference to the *arret* as the ground of the capture, *that* could only be accounted for

for, by his having found that the capture could not be supported on that ground.

Mr. Juſtice *Willes* thought it moſt manifeſt, that the *procés verbal* made at the time of the capture was that on which the ſentence proceeded. The ſentence began with mentioning it, and recited it exactly, as to date, and every thing elſe, as far as it went. The word *purporting* did not require a recital of the whole; and it was not neceſſary for the Admiralty Court to ſet forth the captain's reaſons for detaining the ſhip. He had all along been of opinion, that the ſentence was ſo ambiguous, that it did not appear that the cauſe of condemnation was that the property was neutral, and therefore had thought evidence neceſſary to explain it.

Mr. Juſtice *Aſhhurſt* concurred, as to the ambiguity of the ſentence, and that it was, therefore, not concluſive; and on that ground, Lord *Mansfield*, and *Willes* and *Aſhhurſt*, Juſtices, declared their opinion that the *poſtea* ought to be delivered to the plaintiff. *Lee* ſtill urged the danger of opening the ſentences of foreign courts of Admiralty, which are generally informal; upon which Lord *Mansfield* ſaid, all the ſuppoſed inconvenience would be obviated, if the foreign courts would ſay in their ſentences, "*Condemned as enemy's property.*"

In the caſe juſt reported, it is admitted by all the judges, that a ſentence of a Court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it. And therefore if it appear evident, without a poſſibility of doubt or ambiguity, that the ſentence proceeded upon the ground of the property not being neutral, that is concluſive evidence againſt the inſured, that he has not complied with his warranty; and conſequently the underwriter is no longer reſponſible. This was fully ſettled in the caſe of *Barzillay* v. *Lewis*.

Baring v. Claggett, 3 Boſ. & Pull. 201. and Baring v. Chriſtie, 5 Eaſt's Rep. 398. Acc.

It was an action on a policy of inſurance on a ſhip from *Liverpool* to *Amſterdam*, *warranted Dutch property*; and it was brought to recover for a total loſs, the ſhip having been captured by the *French*, and comdemned by the court of Admiralty there. The plaintiff (the inſured) was nonſuited in this action, from an idea, that the decree of the parliament of *Paris* was deciſive againſt him, that he had not complied with his warranty. Upon a motion to ſet aſide this nonſuit, the following facts

Barzillay v. Lewis, B.R. Trin. Term, 22 Geo. III.

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facts appeared from the report of the judge who tried the cauſe? The ſhip in queſtion was originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *Engliſh* privateer, and carried into *Liverpool*, condemned in *England*, and ſhe then got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a houſe at *Amſterdam*, and a paſſport was ſent for her from thence. She was then inſured by a *Dutch* name, and warranted as in the policy; ſhe went to ſea, was captured by a *French* ſhip, and carried into *St. Maloes*, where ſhe was releaſed by the Vice Admiralty Court as being *Dutch*. But upon an appeal to the parliament of *Paris*, the ſentence was reverſed, and ſhe was condemned as lawful prize, by the name of *The Three Graces of Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one third of the crew of a neutral ſhip are enemies to the king of *France*, the ſhip ſhall be confiſcated: that no ſhip ſhall be conſidered as transferred, till ſhe has been within the port of the purchaſer; and that a paſſport ſhall be deemed fraudulent, unleſs the ſhip has been in the port from whence it has been obtained. The ſhip's crew in queſtion conſiſted of ſixteen, five of whom were *French*, four were *Danes*, two were *Swedes*, one was *Dutch*, one *Portugueſe*, one *Hamburgher*, one *Norwegian*, and one *Iriſhman*. Some of the crew ſwore, that they were hired by *Engliſhmen*, and that both the ſhip and the cargo were *Engliſh*. They alſo ſwore, that when the ſhip which took them came in ſight, the captain ſailed back towards the *Engliſh* coaſt: but one of the crew having informed him, that the ſhip in ſight carried *Engliſh* colours, he reſumed his courſe.

Lord *Mansfield*.—"The ſentence of the Court of Appeal in *France* is concluſive. The queſtion is, What that ſentence means? She is condemned as not being a *Dutch* ſhip. The warranty is, that ſhe is *Dutch*, which is falſe. The law of nations is founded on eternal principles of juſtice; and in every war the belligerent powers make particular regulations for themſelves. But no nation is obliged to be bound by them, unleſs they are agreeable to the general laws of nations; but all third perſons and mercantile people are bound to take notice of them for their own ſafety. In this caſe, the plaintiffs warrant this ſhip to be *Dutch*; and they muſt ſee that ſhe is in ſuch a ſtate as to be entitled

titled to all privileges of neutral property. The insurers took the risk upon this warranty; she was insured by her *Dutch* name, and the underwriters take it for granted that she is so: but when the matter is sifted in *France*, she appears to have none of the requisites to shew she was neutral property, for she had never been in a *Dutch* port, and the sea-brief or passport was not conformable to the treaty of *Utrecht*. The parliament of *Paris* did not condemn her as the *Dutch* ship of *Amsterdam* by her *Dutch* name; but as "*The Three Graces of Liverpool.*" Indeed she had none of the requisites of a *Dutch* ship; and the regulations require that she should have been into the port of the purchaser, in order to transfer the property; the knowledge of all which circumstances the insured, by his warranty, took upon himself. I am therefore of opinion, that the warranty was false." CHAP. XVIII.

Mr. Justice *Willes*, and Mr. Justice *Ashhurst* concurred.

Mr. Justice *Buller*.—"The first sentence seems to have gone on particular *arrêts*. The second appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muster-roll or situation of the crew, as to there being more than two-thirds *English*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; for if she were not so documented as to have the protection of a neutral ship, the warranty has not been complied with." The rule to set aside the nonsuit was accordingly discharged (*a*).

It has also been determined, that where no special ground at all is stated; but the ship is condemned generally as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral, and will not again open the proceedings of the court abroad in favour of the party, who has warranted his property to be neutral.

An action was brought upon a policy of insurance on goods *warranted neutral* on board the *Thetis, a Tuscan ship*, to recover Salucci v. Woodmass, B. R. Hil. 24 Geo. III.

(*a*) In the four first editions a *nisi prius* case of *De Souza* v. *Ewer* occupied the whole of page 361, but the very learned person who decided that case, having since declared from the Bench, with that candour which always attends great talents, that that decision could not be supported, it is here wholly omitted. See 8 Term R. 444, note (*a*).

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the amount of the insurance from the underwriters. The ship had been taken in the course of her voyage by a *Spanish* vessel, carried into *Spain*, and her cargo was there condemned "*as good* "*and lawful prize.*" There was an appeal to a superior court, which reversed the sentence: but upon a further appeal, the latter decision was overturned, and the former confirmed. At the trial of this cause before Lord *Mansfield*, his Lordship being of opinion that the sentence of the *Spanish* Court of Admiralty was conclusive evidence of the falsehood of the plaintiff's warranty, the plaintiff was nonsuited. A motion was made, and fully argued to set aside the nonsuit, which was unanimously refused by the whole Court of King's Bench.

Lord *Mansfield*.—"The policy here warrants that this cargo was neutral property. It appears from the policy itself, that the ship was neutral, because it is called a *Tuscan* ship; but the warranty is that the goods are neutral. It must be presumed from the condemnation, as no other cause appears, that it proceeded on the ground of the property belonging to an enemy. In the case of *Bernardi* v. *Motteux*, the decision of the court turned upon the particular ground of the confiscation appearing on the face of the sentence; and that it did not appear to be on the ground of being enemy's property. This being so, the court gave the party an opportunity to shew by evidence, that the specific ground was really the cause of condemnation. In this case, at *Guildhall*, the counsel admitted the general rule; but they said, if a copy of the proceedings could be had, a special cause would appear. The proceedings are now come; and from them it appears, that the question turned entirely upon the property of the goods. For in the second court, to which they appealed from the sentence of the first, the question was, Whether the goods were free? the decree was, that they were. But the third court overturned the decision of the second. It is sufficient, however, that no special ground is stated; and therefore the rule must be discharged."

Geyer v. Aguilar, 7 Term Rep. 681.

If a foreign Court of Admiralty condemns a ship (warranted *American*) *as enemy's property*, for not having on board a *role d'equipage* or list of the crew, which is required by a *French* ordinance to be on board the ship, and which the Court of Admiralty *adjudged* to be requisite *within the meaning and construction of the treaty*

treaty between the two countries of *France* and *America*, the Court of King's Bench held that the adjudication in *France* was concluſive againſt the warranty, that ſhe was an *American* ſhip, though in fact ſhe was ſo; that point being clearly within the juriſdiction of the foreign Court(*a*).

But where there is *no warranty* of being *American*, a ſentence adjudging a ſhip to be good prize, *as belonging to the enemies of the republic*, negatives no fact, which it was incumbent on the aſſured, having made no warranty, to eſtabliſh; for the *Engliſh* courts are only bound by the decretory, or concluding part of the ſentence, and, where the adjudication is on the ground of enemy's property, are not bound to examine the premiſes that led to the concluſion. If, indeed, there had been a warranty, the adjudication that it was enemy's property would have been concluſive againſt ſuch a warranty. Chriſtie v. Secretan, 8 Term Rep. 192.

Goods were inſured on board the Hermon, without any addition of country or place, and not repreſented to be of any particular country at the time of ſubſcribing the policy, although the broker, when the ſhip was ſubſcribed, had ſaid, ſhe was an *American*; it was held that, though ſhe was, in fact, an *American*, ſhe need not, under theſe circumſtances, be documented as ſuch to entitle the aſſured to recover againſt the underwriters, for a loſs by capture, and ſubſequent condemnation, for want of the documents required by treaty between her own and the capturing ſtate; for ſhe was neither inſured as *American*, nor repreſented to be ſuch at the time when the policy was effected. Dawſon v. Atty, 7 Eaſt's Rep. 367.

If the ground of deciſion appear to be not on the want of neutrality, but upon a foreign ordinance, manifeſtly unjuſt, and contrary to the laws of nations, and the inſured has only infringed ſuch a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty, ſo as to diſcharge the inſurer.

(*a*) Even where there has been no ſentence of condemnation, if a ſhip is warranted *American*, and ſails without ſuch a paſſport, as is required by the treaty between *France* and *America*, the warranty is not complied with, and the underwriters are diſcharged; even though the ſhip ſuffers no inconvenience from the want of it. Such a warranty does not mean merely that the ſhip is *American* property, but that ſhe is entitled to all the privileges of an *American* flag. Rich v. Parker, 7 Term Rep. 705.

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Mayne v. Walter, B. R. Eaſt. 22 Geo. III.

In a policy of inſurance, *the ſhip was warranted to be Portugueze*; and having been taken in her voyage by a *French* privateer, ſhe was carried into *France*. The Court of Admiralty condemned her becauſe ſhe had an *Engliſh* ſupercargo on board. It appeared that there was a *French* ordinance, prohibiting any *Dutch* ſhip from carrying a ſupercargo belonging to any nation at enmity with the court of *France*. In an action againſt the underwriter, theſe facts appeared; upon which, a verdict was found for the plaintiff, ſubject to the opinion of the Court, upon this queſtion, Whether the circumſtance of having an *Engliſh* ſupercargo was a breach of neutrality; and whether ſuch a ſentence was concluſive?

Lord *Mansfield*.—"It is an arbitrary and oppreſſive regulation, contrary to the law of nations, and there is no proof that the plaintiff knew any thing of it. If you were both ignorant of it, the underwriter muſt run all riſks; and if the defendant knew of the edict, it was his duty to enquire, if there was ſuch a ſupercargo on board. It muſt be a fraudulent concealment to vitiate a policy. But it is remarkable that neither party has ſaid any thing of the treaties between *France* and *Portugal*; neither party ſeems to know any thing about them, and yet the whole caſe turns upon them." Judgment for the plaintiff (*a*).

The caſe juſt reported has undergone a variety of diſcuſſion in *Weſtminſter-hall*, and has lately received moſt ample confirmation in two or three caſes, which ſhall be mentioned in their order; and by which the principle ſeems fully eſtabliſhed, that if the ſentence of the Court of Admiralty has not decided the queſtion of property, and has not declared, whether it be neutral or not, the inſured, who has warranted his property to be neutral, ſhall not be precluded from recovering againſt the underwriters, although the foreign Court of Admiralty has condemned the property as prize, for having violated ſome of their ordinances.

Pollard v. Bell, 8 Term. Rep. 434.

The firſt of theſe caſes was an inſurance on goods on board the ſhip *Juliana*, "warranted a *Dane*," on a voyage from *London* to *Teneriffe*, with liberty to touch at *Guernſey* and *Madeira*,

Siſſkin v. Lee, 2 New R. 484.

(*a*) So if a ſhip be reſtored, but damages and coſts denied to the claimants, becauſe they had not fully complied, as to their documents, with certain *French* ordinances the aſſured may recover for the detention notwithſtanding.

for account of perſons reſident at *Teneriffe*; and the loſs was declared to be by capture. At the trial, a verdict was found for the plaintiff, ſubject to the opinion of the Court upon a caſe, which ſtated, that the ſhip *was a Daniſh ſhip*, and *the property of Daniſh ſubjects*, and previous to the voyage inſured, had a paſſport ſigned by the king of *Denmark*, for a voyage from *Copenhagen* to ports in the *Eaſt Indies*. *Eggleſton*, the captain of the ſhip, ſailed from *Copenhagen* on the 23d *June* 1796, having on board a cargo of tar, pitch, &c. and arrived in the *Thames*, according to verbal orders from his owners, 23d *July* 1796. During his ſtay he took on board goods for the owners, beſides thoſe in queſtion, and having taken out clearances for *Madeira* and *Guernſey*, ſailed, arrived at the latter place, and after ſailing from thence, was captured by a *French* privateer, and carried into *Bourdeaux*. At the time of the capture, and during the whole voyage, the *Juliana* had on board the *paſſport and every other document uſually carried by Daniſh ſhips*. She had alſo a *role d'equipage*, containing the names and places of nativity of the officers, but not of the crew, only ſtating the latter generally to be ſixty men of colour. Captain *Eggleſton* was born in *Scotland*, of *Britiſh* parents. He was not naturalized in *Denmark*; but on the 6th of *October* 1794, poſterior to the war between *England* and *France*, he obtained letters of burgherſhip in *Denmark*, but had no domicile, never having reſided there.

Proceedings were inſtituted at *Bourdeaux*, before the Tribunal of Commerce, which condemned the ſhip and cargo, except one bale, belonging to the captain, as prize. From this ſentence Captain *Eggleſton* appealed to the Civil Tribunal of *La Gironde*, where there was a general ſentence of condemnation. Theſe ſentences referred to ſeveral *French* ordinances, particularly the one alluded to in *Mayne* v. *Walter*, of 1778, by which it is declared, that all ſhips ſhall be confiſcated "wherever there ſhall "be found on board a ſupercargo, merchant, commiſſary, or "*chief officer*, being an enemy." It is not neceſſary to ſtate theſe ſentences, becauſe the Court of King's Bench were of opinion, that the effect of thoſe ſentences, and particularly of the ultimate ſentence now to be mentioned, was to condemn, *not on the ground that the property was not neutral*, but becauſe the circumſtance of the captain's being a *Scotchman*, was a violation of this ordinance. From the two former ſentences, the captain

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appealed to the Supreme Tribunal of Caſſation at *Paris*, which decreed as follows: "Having heard the parties, the Tribunal conſidering that it has been fully proved, by the confeſſion of Captain *Eggleſton*, and aſcertained by the judges of *La Gironde that the ſaid Captain Eggleſton was born in Scotland, and an enemy*; that his denization in a neutral country was not juſtified according to law; *that his quality of enemy ſufficed to legitimate the prize*; that the fact of captain *Eggleſton* being a *Scot* and an enemy, exiſted independently of the papers on board; that in conſequence all remedies of nullity drawn either from the withdrawing of ſome of the papers on board, or from the non-application of the ſeal to the bag wherein they were incloſed, cannot give any ground to caſſation; rejects the requeſt of Captain *Eggleſton*, and condemns him to the fine of 150 francs." After this caſe was twice argued,

Lord *Kenyon* C. J. ſaid—"This is an action on a policy of inſurance on goods on board a ſhip warranted to be a *Daniſh* ſhip: a loſs having happened, the defendant reſiſts the plaintiff's claim, becauſe (he ſays) the ſhip in queſtion was not, what ſhe was warranted to be, *Daniſh*: and I agree with the defendant, that the meaning of the warranty was, not merely that the ſhip was *Daniſh* built, but that ſhe ought to be ſo circumſtanced, during the voyage, as a *Daniſh* ſhip ought to be. This does not appear to me to be a caſe of difficulty though it is of great importance to the public. This is one of the numberleſs queſtions that have ariſen in conſequence of the extraordinary ſentences of condemnation paſſed by the Courts of Admiralty in *France* during the war. I do not think they were characterized too ſtrongly at the bar, when it was ſtated they all proceeded on a ſyſtem of plunder: but ſtill until the legiſlature interferes on this ſubject, we ſitting in a court of law are bound to give credit to the ſentences of a competent juriſdiction. *If therefore in this inſtance the French Courts had condemned this ſhip on the ground that it was not Daniſh property, we ſhould have been concluded by that ſentence in this action*, and muſt (however reluctantly, it being ſtated as a fact in the beginning of the caſe, that it was a *Daniſh* ſhip,) have given judgment for the defendant. This is proved by the different caſes cited in the argument, with the deciſions in which I concur, and it is ſupported by reaſon. To a queſtion aſked in the courſe

courſe of the argument, What are the rules by which Courts of Admiralty profeſs to proceed? I anſwer, the law of nations, and ſuch treaties as particular ſtates have agreed ſhould be engrafted on that law. It was ſaid, however, by the defendant's counſel, that an *arrêt* has the ſame force as a treaty: but, without ſtopping to enlarge on the difference between them, it is ſufficient to ſay, one is a contract made by the contracting parties, and the other is an *ex parte* ordinance made by one nation only, to which no other is a party; and I concur with Lord *Mansfield* in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. That is the ground, on which this caſe muſt be decided. Now let us ſee what was the foundation of the condemnation in the *French* courts? It is ſtated in one of the ſentences, that, by their own ordinances, all ſhips are to be confiſcated, "whenſoever on board theſe ſhips ſhall be found a "ſupercargo, merchant, commiſſary, or *chief officer, being an enemy.*" But I ſay, they had no right in making ſuch an ordinance to bind other nations. *Then was the ſhip in queſtion condemned on the ground that ſhe was not Daniſh property?* Certainly not. A vaſt variety of circumſtances wholly irrelevant, are ſet forth in the ſentences: but it appears, beyond all doubt, that *the ſhip was at laſt condemned on the ground that the captain was one of thoſe perſons whom by their own ordinance only, they wiſhed to proſcribe.* This caſe cannot be diſtinguiſhed from that of *Mayne* v. *Walter*; though even without the authority of that caſe I ſhould have had no heſitation in deciding in favour of the plaintiff. *On the whole, therefore, I am of opinion, that though, if contrary to juſtice, the ſhip had been condemned ſimply becauſe ſhe was not a Daniſh ſhip, we ſhould have been concluded by that ſentence, yet as the Courts abroad have endeavoured to give other ſupports to their judgments which do not warrant it, and have ſtated as the foundation of the ſentence of condemnation, one of their own ordinances, which is not binding on other nations, this ſentence does not prove that the ſhip in queſtion was not a neutral ſhip;* and conſequently the plaintiff is entitled to recover."

Groſe J.—"This is an action brought on a policy of inſurance to recover the amount of a loſs ſtated in the declaration. The plaintiff proved his intereſt, and the loſs, and *primâ facie* proved that the ſhip was *Daniſh*. The defence to the action is, firſt,

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that though it is ſtated the ſhip was *Daniſh*, ſhe was in truth the property of an enemy, and therefore not neutral; and ſecondly, that ſhe had not documents on board to prove that ſhe was neutral. With regard to the firſt, it is not only not ſtated as a fact, nor to be collected by inference that ſhe was not a neutral ſhip, but it *is expreſsly ſtated as a fact* in the former part of the caſe, that *the ſhip was a Daniſh ſhip* and the property of *Daniſh* ſubjects. If this had been found as a fact on a ſpecial verdict, it would have been concluſive, and we could not have inferred the contrary from the ſentence; but referring to the ſentence, it comes to this, that it there appears that the ſhip was a *Daniſh* ſhip, unleſs the circumſtance of the captain's having been born in *Scotland* is evidence to ſhew that it was not a *Daniſh* ſhip: but I find nothing to warrant that either in our own law or in the law of nations. In the caſe of *Mayne* v. *Walter*, the Court of Admiralty in *France* condemned the ſhip, becauſe ſhe had an *Engliſh* ſupercargo on board, which was contrary to one of the *French* ordinances: but this Court did not conſider, that the circumſtance of a neutral ſhip having on board an *Engliſh* ſupercargo was a breach of neutrality. *So here this ſhip having on board a native of Scotland is no proof that the ſhip in queſtion was not neutral.* As to the ſecond queſtion, if the ſhip had been condemned for not having the proper documents on board, we muſt have decided for the defendants. But it appears by the caſe, that in point of fact ſhe had "every document uſually carried by "*Daniſh* ſhips." *I admit that if the ſhip had been condemned generally as a lawful prize, our law would have conſidered that as a denial of her neutrality; or if the ground of the ſentence of condemnation had been that the ſhip was not neutral, that alſo would have been concluſive in this action.* But by referring to the laſt ſentence which I conſider as the ſentence of *dernier reſort*, it evidently appears, that ſhe was condemned becauſe the captain was born in *Scotland*, and an enemy. My opinion then on the whole is, *that as the ground of the ſentence of condemnation was an infringement of an ordinance of one ſtate, it does not appear by that ſentence that the ſhip was not, what the jury found her to be, a Daniſh ſhip, or that ſhe was condemned for having, by an act contrary to the law of nations, forfeited her neutrality.*"

Lawrence J.—"The queſtion is, Whether the ſentence has negatived the warranty of neutrality? *The warranty of neutrality does*

does not induce any neceſſity to comply with the peculiar regulations of the belligerent powers. For if a ſhip be captured, and the queſtion be, whether ſhe be neutral or not, the general rule for judging and deciding on that point is the law of nations, ſubject to ſuch alterations and modifications, as may have been introduced by treaties: but where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all queſtions on matter of prize. This is clearly laid down in a ſtate paper ſigned by Sir *George Lee*, Dr. *Paul* the King's Advocare, and Sir *D. Ryder* and Mr. *Murray* then Attorney and Solicitor General, in anſwer to the *Pruſſian* memorial concerning neutral ſhips (*a*). When therefore a ſtate in amity with a belligerent power has by treaty agreed that the ſhips of their ſubjects ſhall only have the character when furniſhed with certain preciſe documents, whoever warrants a ſhip, as the property of ſuch ſubject, ſhould provide himſelf with thoſe evidences, which have by the country to which it belongs been agreed to be the neceſſary proof of that character. In requiring this, no difficulty is impoſed, of which the aſſured is not aware, and which may not be in his power to prevent: but to require of him to furniſh himſelf with every document the belligerent powers may require, and to inſiſt that the warranty is not complied with, unleſs the ſhip be navigated according to their ordinances and regulations, would be to deprive the aſſured of his indemnity for the want of papers, &c., of the neceſſity of which he may fairly be preſumed ignorant, and which papers it may not be in his power to procure: for how can the officers of one country be called on to grant that, which the laws of their own country do not require? Theſe French decrees are regulations made with ſome view to the laws of France, but are not applicable to the ſubjects of any other country. In examining the caſes decided on this point, it will not be found that there is any determination of the court to ſupport what has been inſiſted on by the defendant: but on the contrary it has been ſettled in many caſes, *that a condemnation on the particular ordinances of a belligerent power is no violation of a warranty of neutrality.* In the caſe of *Bernardi* v. *Motteux* the ſhip *Joanna* was warranted neutral; the only doubt was, whether the ſhip were condemned as being the

Supra, 464.

(*a*) Vide Collectanea Juridica, 1 vol. 33. and 2d Poſtlethwaite's Dictionary, 725. article *Sileſia*.

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property of an enemy, or for violating a *French arrêt* by throwing papers overboard; for the one or the other of those causes she was condemned. If she were condemned for the first, namely, *that she was not neutral, the plaintiff clearly could not have recovered:* nor could he have recovered if she were condemned on the other ground, according to the argument of the defendant in this case: but it is clear, that the court did not, in that case, adopt the defendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. [The learned Judge here also commented on the case of *Barzillay* v. *Lewis*, *supra*, 469. and on *Salucci* v. *Johnson*, *post.* and *Mayne* v. *Walter*, *supra*, 474. *a.* and then proceeded.] The argument of the defendant here is, that the sentence of condemnation is conclusive on the point that the ship was not navigated according to the contract between the parties: *the contract between the parties is that she was a neutral ship, but the sentence has not decided that point; it has only decided that she was not navigated according to the ordinances of France, but that was no part of the plaintiff's contract.* In deciding this case, in favour of the plaintiff, we do not take upon ourselves to say that the sentence of the *French* court of admiralty is erroneous: all that we determine is, that *the French court has not decided that, which would be a breach of the warranty of neutrality.* On the whole I think it clear that the ship in question was condemned for acting in contravention of *French* ordinances, and that does not falsify the warranty of neutrality."

Le Blanc J.—"On examining the sentences in the different courts of *France, we cannot collect, that the ship was ultimately condemned because she was not a Danish ship.* As the grounds of condemnation are stated in the sentences themselves, *unless we can collect that the ship was condemned as prize, because she was not a Danish ship, those sentences are not conclusive on this question between the litigating parties.* The question in this case is, Whether or not the ship were *Danish?* in looking through these sentences of condemnation, *I do not find that she was condemned as not being Danish, or for not having those documents, that the law of nations or particular treaties between the respective countries require to evidence her to be a Danish or neutral ship.* The sentences in *France*, whether right or wrong, are conclusive on the question of prize; and there-

therefore if the queſtion here had been, Whether or not the ſhip had been captured as prize, thoſe ſentences would have been concluſive. But that is not the queſtion here; the only queſtion here being, Whether or not this were a neutral ſhip at the time of the capture? I admit, that in order to comply with the warranty of neutrality it was neceſſary, not only that the ſhip ſhould be a neutral ſhip, but alſo that ſhe ſhould be properly documented, and ſhould be navigated in ſuch a manner as to be entitled to the benefits of neutral ſhips. But here the ſhip was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that *Denmark* ever conſented. Then the queſtion is, Whether a ſentence, appearing on the face of it to have been given on that ground, ought to preclude the plaintiff from ſhewing, that in point of fact the ſhip was a *Daniſh* ſhip? *As it does not appear on the ſentence that the ſhip was condemned as not being a Daniſh ſhip, I think it is competent for the parties to go into the proof of that fact.* Without repeating the authorities that have been referred to in ſupport of our opinion, I think that the concluſion from them all is this; that *the ſentence of a foreign court is concluſive on that point which it profeſſes to decide; if it be a general ſentence of condemnation, without aſſigning any reaſon, the courts here will conſider that it proceeded on the grounds of the ſhip being the property of an enemy; but if the ſentence itſelf profeſs to be made on particular grounds, and they are ſet forth in the ſentence, and appear not to warrant the condemnation, then the ſentence is not concluſive as to thoſe facts.* Therefore as the ſentences of condemnation in this caſe profeſs to be made on an ordinance of *France*, to which *Denmark* is no party, *they do not falſify the warranty of neutrality as between the parties to this cauſe, though they may juſtify the courts abroad in condemning the ſhip as prize.* If the queſtion here had been, whether or not the ſhip had been prize; the ſentences abroad would have been concluſive: but the queſtion here being only, whether or not the ſhip were neutral; thoſe ſentences are not concluſive on that point." Judgment was given for the plaintiff.

I have given the opinions of the learned judges nearly at length; becauſe it was a caſe maturely and fully conſidered by them; and becauſe the diſtinctions there taken ſupport the former deciſions of Lord *Mansfield* and the judges, who compoſed the

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the court in his time; and because the same distinctions appear to me to support and maintain all the subsequent decisions.

Bird v. Appleton, 8 Term Rep. 562 See ante, c. 12

The next case upon this subject, and which has already been mentioned for another point in a former chapter, was an insurance on the ship *Confederacy*, *an American ship*, at and from *Canton* in *China* to *Hamburgh* or *Copenhagen*: and at the trial a special verdict was found, the facts of which, as far as this point requires the statement of them, were, "that the ship *Confederacy* was an *American*-built ship, *the property of American subjects*; that the ship sailed from *Canton* towards *Hamburgh* with the goods on board in *January* 1797, having on board a passport duly made out and granted according to the form annexed to the Treaty of Commerce between *France* and *America*, and during her voyage was captured by a *French* ship of war, and carried into *Nantz*; where proceedings being instituted before the tribunal for determining questions of prize, the ship and cargo were condemned as prize." The sentence began with the following considerations: "Considering that although it appears "by reading and examining the documents, and by the declara- "tion of the captain, supercargo, and the greatest part of the "crew, *that the ship Confederacy has not ceased to be neutral pro- "perty, and belonging to neutral citizens and subjects* of the United "States of *America*: considering that although by the same "documents and declarations, it is equally evident and proved, "*that the goods shipped were laden by neutral citizens for account "of neutral citizens*: considering that, notwithstanding these "favourable presumptions, nothing can exonerate the captain "and supercargo from having regular dispatches, in order to prove "the neutrality of the ship. The sentence then proceeds to recite certain *French* ordinances, which declare to be good prize all neutral vessels not having on board a list of the crew attested by the public officers of the neutral places. It then says, "consider- "ing that so far from derogating from the general regulations "for all nations in favour of the *Anglo-Americans* by the treaty "of *February* 1778, it implicitly subjects them to it by the 25th "and 27th articles, which oblige them to conform to the model "of the passport annexed to the treaty." It also states a law of the Convention, and another of the Executive Directory of the 12th *Ventose* of the 5th year, which latter recites the ordinances of 1744 and 1778, and declares, that all *American* vessels

shall

ſhall in conſequence be good prize, which ſhall not have on board a liſt of the crew in due form, ſuch as is preſcribed by the model annexed to the treaty between *France* and *America* of 1778. The ſentence then concludes thus: "The Tribunal, in con- "formity to the above-mentioned laws and regulations, and par- "ticularly the decree of the Executive Directory of the 12th "*Ventoſe*, 5th year, adjudges and declares the validity of the "prize of the *foreign* ſhip the *Confederacy*, and all the goods and "effects compoſing the lading or cargo of the ſhip, *in default of* "*the captain and ſupercargo being regular in their liſt of crew and* "*diſpatches*." The ſpecial verdict alſo found that ſhips belonging to *America* never did at any time prior to the capture in queſtion carry with them liſts of their crew atteſted in the manner required by the ordinances referred to; and that *America* has always inſiſted, and ſtill inſiſts, that her ſhips are not, by treaty or otherwiſe, bound or obliged ſo to do.

This ſpecial verdict was argued ſeveral times upon the various points that aroſe upon it; and the judges afterwards delivered their opinions unanimouſly, as to this point, in favour of the aſſured, namely, that the *French* ſentence did not decide that the ſhip was not neutral.

Lord *Kenyon* ſaid—"After the greateſt attention I have been able to beſtow on the ſubject, I adhere to the opinion that we gave in the caſe of *Pollard* v. *Bell*, and that deciſion is directly in point to the preſent caſe." His lordſhip then adverted to particular parts of the ſentence, which it is unneceſſary here to conſider; but concluded that it was manifeſt from an attentive conſideration of the whole ſentence, that the ſingle ground, on which it proceeded, was that mentioned in the concluding part of the ſentence, namely, "*in default of the captain and ſupercago being regular in their liſt of crew and their diſpatches*." Now that is neither required by the law of nations, or by the treaty between *France* and the United States of *America*, and it is found by the verdict that all the requiſites of that treaty were complied with.

Mr. Juſtice *Groſe* concurred.

Mr. Juſtice *Lawrence*.—"The only remaining queſtion is, *Whether or not it were decided by the foreign ſentence that the ſhip was*

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was an American? It was determined in the case of *Pollard* v. *Bell*, that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country, of which the owner of the property is a subject, will not prevent the assured recovering on the policy, on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is, not so much to dispute the authority of that case, as its application to the case before us. However, I am of opinion, that, on the whole, we must consider that the foundation of this sentence of condemnation was the violation of *French* ordinances only, and consequently the case of *Pollard* v. *Bell* is a direct authority for the present."

Mr. Justice *Le Blanc*.—"It only remains to be considered, *whether or not the warranty that the ship was an American, is negatived by the sentence of condemnation*. We must look to the concluding part of this sentence to see the grounds on which the foreign court professed to decide. If that determination had been founded either on the law of nations, or on the treaty subsisting between *France* and *America*, we could not have enquired whether or not that court had formed a right decision. But if we see that that court condemned the ship and cargo, neither on the law of nations or on the treaty between *America* and *France*, then we are bound to declare, *that such a sentence is not conclusive on the parties to this action: it does not affect the question respecting the warranty of neutrality*. And I think the sentence is founded simply on an infringement of the *French* ordinances which are particularly pointed out in the sentence, and not any breach of the law of nations or of the treaty between *France* and *America*."

Judgment for the plaintiff.

Price v. Bell, 1 East's Rep. 663.

In a subsequent case upon a special verdict, the insurance was on a ship and goods, the ship being in fact an *American*, but not warranted to be so, and the case seems to turn, not on the point of enemy's property, but on this, whether the ship was documented as an *American* ship ought to have been according to its own laws and its treaties with other countries. She was provided with a passport, such as is constantly used by all *American*

can ſhips, and all other uſual papers, and a new muſter roll, made upon oath before the Lord Mayor of *London*, ſeveral of his original crew having died, but all the new men being *Americans*, and ſigned and certified by the *American* Miniſter, having left the original muſter roll with the ſaid Miniſter. The ſhip ſailed from *London* bound for *Charleſtown*, the voyage inſured, and was captured by a *French* privateer and carried into *L'Orient*. The ſentence of the firſt tribunal ſtated the queſtions of law to be, Whether the new muſter roll was in the legal form to ſupply the firſt liſt? And ſecondly, Whether the bills of lading and other papers touching the cargo prove the neutral property of it? It then proceeds with various conſiderations, of violated ordinances of *July* 1778, and a decree of the Executive Directory promulgating the ordinances of 1744 and 1778, and decrees the ſhip and cargo to be good prize: although one of the conſiderations is to this effect, conſidering in law that the regiſter and ſea letter *prove the American property of the ſhip*, but the log-book proves that the paſſport has ſerved for ſeveral voyages, *contrary to the formal regulations of the 4th article of the ordinance of July* 1778. From this ſentence, the captain appealed; but the ſuperior court declared the former ſentence valid, adding to the former ordinances, *a law* of the 29*th Nivoſe* laſt, expreſſing, "the ſtate of ſhips in regard to what concerns their neutral or enemy's quality ſhall be determined by their cargo; *therefore every veſſel met at ſea laden entirely or in part with goods the produce of England, ſhall be declared lawful prize, whoever may be the owner.*" This ſpecial verdict was argued three ſeveral times at the bar, and the Court took time to conſider of their opinion, it appearing that the main difficulty of the caſe turned upon the queſtion of an implied warranty, there being no expreſs one.

The Court did not decide that point, for they were ultimately of opinion, as was declared by Lord *Kenyon* in pronouncing their unanimous judgment, that ſuppoſing an implied warranty did exiſt, *the ſentences did not negative ſuch a warranty*, both the ſentences appearing manifeſtly to have proceeded on the ground of a breach of *French* ordinances, which were contrary to the treaty between the two countries, were not adopted by it, nor is the condemnation expreſſed by the ſentence to have been for acting contrary to the treaty. Judgment for the plaintiff.

But

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Baring v. Royal Exch. Aſſ. Comp. 5 Eaſt 99.

But where the foreign ſentence profeſſes to proceed on the ground of an infraction of treaty, ſuch ſentence is concluſive againſt the warranty, although inferences were drawn in ſuch ſentence from *ex parte* ordinances in aid of their concluſion that the treaty was broken.

The judgments of the Court of King's Bench, when ſo deliberately conſidered, as thoſe juſt recited, ſeldom require illuſtration or confirmation: yet as a caſe has lately occurred in the Privy Council, upon an appeal from the Court of the Recorder at *Madras*, in which the caſe of *Pollard* v. *Bell*, and the principles there laid down were much debated at the bar, and a very learned judgment pronounced by Sir *William Grant*, the Maſter of the Rolls, the Board conſiſting at that time of himſelf, Sir *William Scott* (the Judge of the High Court of Admiralty), Sir *William Wynne* (the Dean of the Arches), and Lord *Glenbervie*, it is thought proper to inſert that deciſion here. It is true the judgment was pronounced in favour of the underwriters: but upon adverting to the grounds of the deciſion it will appear, that their lordſhips ſo determined becauſe they were of opinion that the ſentence of the Court of Admiralty had expreſsly decided, *that the property was not neutral*, and of courſe had negatived the warranty of neutrality: and even if their lordſhips had erred in ſuppoſing the Court of Admiralty to have decided that point, ſtill their deciſion would not negative any principle of law, as eſtabliſhed by former caſes.

Kinderſley and others appellants v. Chaſe and others reſpondents, Cockpit, July 21 & 22, 1801.

It was an inſurance effected at *Madras* by the appellants, on account of the *Swediſh Aſiatic* Company, on the ſhip *Reſolution*, Captain *Neale*, and the inſurance was declared to be *on goods*, as intereſt may appear, and *warranted Swediſh property*. The ſhip ſailed with a valuable cargo, and being obliged to put into the *Iſle of France* for refreſhment, the ſhip and cargo were there ſeized as prize, and ultimately condemned. The Tribunal of Commerce in the *Iſle of France*, after enumerating the various papers and documents found on board, proceeds to ſtate, "That "the legal queſtions for inveſtigation and deciſion are, firſt, "Whether the proceedings in regard to the fact of the ſeizure "of the ſhip were carried on agreeably to the terms of the laws "relative to proceedings in matter of prize? 2d, *Whether*, by "the

" the papers compoſing the ſaid proceedings, and there pro-
" duced by the reſpective parties, and alſo from the objections
" and exceptions ſeverally taken, and by the terms of the regu-
" lations and ordinances made on the ſubject of the navigation
" of neutral veſſels in time of war, *the ſaid ſhip and her cargo*
" *muſt be conſidered as enemy's property, and as ſuch confiſcated to the*
" *uſe of the Republic; or whether on the contrary the ſaid ſhip and*
" *her cargo muſt be conſidered as Swediſh property, and reſtored*
" *to the claimants?*" The ſentence as to the ſecond queſtion proceeds thus; "conſidering that it appears, as well by the confeſſion of the maſter on his examination, as by the declaration of the paſſengers and others of the crew, that he is an *Engliſhman* by birth. Conſidering that the character of a naturalized *Swede*, adopted by him in the proceedings, cannot be legally entertained; ſeeing that inſtead of providing by letters of naturalization from the King of *Sweden*, he only produces an act of his having taken the oath on the 14th *July* 1795, before the Burgomaſter of *Gottenburg*, which is inſufficient, by reaſon that every act of nationalty or neutralization, can only be proved, *according to the uſage of the European powers*, by an act iſſued by the prince himſelf. Conſidering that, even though this certificate of the oath having been taken, ſhould be conſidered as equivalent to letters of naturalization, granted by the King of *Sweden*, it would want the condition required by law for its validity, as it could only have been made two years ſubſequent to the declaration of war with *England*, and would conſequently be directly oppoſite to the words of the 6th article of the regulation of neutrals in 1778, which are as follows: " No regard will any more be paid
" to paſſports granted by neutral powers or allies, as well to
" owners as maſters of ſhips, ſubjects of ſtates in enmity with
" his majeſty, if they are not neutralized, or have not transfer-
" red their property to the ſtates of thoſe powers three months
" before the firſt of *September* of the preſent year." Conſidering that it alſo appears, as well by the proceedings, as by the declaration of the crew, and that of Mr. *Gordon*, that the ſaid *Gordon* is a *Scotchman*, conſequently an enemy; that he was ſecond captain on board the ſaid ſhip *Reſolution*; and that he certainly exerciſed the functions thereof from the period of his leaving *Europe*, and during the whole of the voyage; that this firſt officer was ſhipped at *Guernſey*, without any of the forms

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preſcribed by law being obſerved, for proving the diſembarkation of the perſon mentioned in the muſter roll, as likewiſe the neceſſity of replacing him with an officer of an hoſtile power. Conſidering that the regulation of 1778, declaring lawful prize foreign veſſels, on board of which there ſhall be a ſupercargo, merchant, clerk, or principal officer of an enemy's country, ſave in thoſe caſes as excepted in the 10th article, where the papers ſhall prove by documents found on board, that they were under the neceſſity of taking on board chief officers or ſailors, at the ports they put into, to replace thoſe belonging to a neutral country, which died in the courſe of the voyage; and the defendants do not in any manner prove it, agreeably to the directions and regulations. Conſidering that *the general invoice and bill of lading produced by the captain, the particular invoice of the cargo made by Kinderſley, Watts*, and Company, and *Colt, Day* and Company of *Madras, being unſigned*, cannot be received by the Court conformably to the 2d article of the ſame regulation. Conſidering that the papers produced by Captain *Neale, as well to eſtabliſh the pretended character of an American*, as likewiſe to prove the exiſtence of the neceſſity he was in to replace, at *Guernſey*, the firſt officer inſerted in the muſter roll by Mr. *Gordon*, are neither ſufficient nor legal; and that even admitting them to be ſo, they could not be received by the Court, by reaſon that they were not delivered within the time preſcribed by the terms of the 11th article of the ſame regulation. Conſidering that the cargo ſhipped by *Harrop* and *Stephenſon* of *Tranquebar*, is for account of the operations of the ſhip *Reſolution*, as appears by account current of the ſaid gentlemen, of the 29th *March* 1797. Conſidering finally, that the King's letters of the 23d of *May* 1780, iſſued by order of the Colonial Aſſembly, and regiſtered in the Tribunal, as forming part of the regulation of 1778, has no other object than to maintain the directions of the regulations, and to recommend circumſpection to captains of armed ſhips towards neutral veſſels. *Every thing conſidered*, the court adminiſtering juſtice, and without paying attention either to the points and demands, or to the matters of nullity contended for by the defendants in regard to the proceedings taken by the juſtice of peace, declare the ſeizure of the ſhip *Reſolution* to be good and lawful, order the ſaid ſhip and cargo to be condemned for the uſe of the republic.

This case came on to be tried on the plea side of the Recorder's Court at *Madras*; and a verdict was given for the appellants, subject to the opinion of the Court upon a case reserved upon the single point as to the effect or operation of the sentence of the Court of Admiralty in the Isle of *France*, the Recorder (Sir *Thomas Strange*, now Chief Justice of the Supreme Court of Judicature lately constituted at *Madras*) being of opinion at the trial, that independently of the *French* sentence, the appellants had made out a sufficient case to entitle them to a verdict. Upon the argument of this case, Sir *Thomas Strange* gave judgment for the respondents, stating as the ground of his decision, that the Admiralty Court had considered the question, whether the property was enemy's or neutral, and had condemned it as enemy's, and consequently the warranty was conclusively disproved by that sentence.

From this judgment the present appeal was brought, and after elaborate argument at the bar, the Lords of the Privy Council dismissed the appeal, and their judgment was pronounced by

Sir William Grant.

The Master of the Rolls.—"It is necessary to make a few observations to shew the grounds upon which our opinion proceeds, confirming the judgment of the Recorder of the Court at *Madras*.

"The opinion, which we have formed as to the effect of the sentence of condemnation, makes it unnecessary for us to go into the consideration of all the questions that have been raised in the course of the discussion. With regard to one, which was started towards the conclusion of the argument, Whether a sentence of condemnation in an Admiralty Court can ever, in a Court of Common Law, be held to falsify a warranty in a policy of insurance of one, who is no party to it? I think it is not open to make that question. Till now, no objection has been made, on the part of the appellants, to the sentence *as evidence*, their *gravamen* was, not that it was received for the purpose for which it was offered, but that being received, it did not shew that the condemnation proceeded on the ground of enemy's property: that was the sole question agitated in the Court below. Supposing it had been open to raise that question, I conceive it must here at least have been raised in vain;

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for ſitting here as a Court of Appeal from a Court of Municipal Law, we muſt decide according to thoſe rules, which we find eſtabliſhed for Courts of Municipal Law; and therefore we muſt decide a queſtion on a policy of inſurance, in the ſame manner as we find a Court in *Weſtminſter-hall* would have decided ſuch a queſtion. Now it is quite clear, that from the time of Lord *Hale* down to the preſent period, it has been ſettled that a ſentence of condemnation in a Court of Admiralty is concluſive. When it proceeds on the grounds of enemy's property, it is concluſive that the property does belong to enemies, not only for the immediate purpoſe of ſuch a ſentence, but it is binding on all Courts and as againſt all perſons. This has been ſo clearly underſtood, that it was not even controverted in the caſe of the Dutcheſs of *Kingſton*, where the concluſive effect of all ſorts of evidence was ſo ably diſcuſſed. It was admitted that the ſentence of a Court of Admiralty, proceeding *in rem*, muſt bind all parties—muſt bind all the world. Now taking a ſentence to be concluſive, when it has diſtinctly determined, that the property belonged to enemies, a queſtion is made, Whether *this ſentence* is to produce this effect? It is ſaid every ſentence of condemnation does not produce that effect; becauſe by a great many deciſions, it has been now eſtabliſhed, that if it clearly appears, on the face of the ſentence, that it was not on the ground of enemy's property that the condemnation proceeded, but that the Court bottomed itſelf on ſome diſtinct ground, in that caſe, the warranty of neutrality is not neceſſarily falſified by ſuch a ſentence of condemnation; and certainly there are ſeveral caſes that have ſo decided. I have looked at them all, and not one of them will be contradicted by our deciſion on this caſe. It is generally to be preſumed, that ſuch ſentences proceed on legitimate grounds; and therefore they are in general concluſive proof, with reſpect to the property; negativing the warranty of neutrality, and proving the propriety of the condemnation. Hence it follows, that it does not lie on the party producing the ſentence, to ſhew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the ſentence, to ſhew that it proceeded on ſome other ground. That I take to be the effect of theſe deciſions; and therefore it is neceſſary here to ſhew ſome diſtinct and collateral ground, on which the ſentence has proceeded, leaving the queſtion of property entirely

undetermined: and accordingly in every one of the cases, in which the effect contended for by the underwriters has been denied to a sentence of condemnation, the court of common law has thought itself warranted in coming to this conclusion, that the sentence itself shews that the question of property was not, and was not professed to be, decided by the Court of Admiralty. What is the case here? The Court expressly tells us, what the questions were which they had to decide—One question was, "Whether the proceedings were regular? The other "question was, Whether by the papers composing the said pro-"ceedings, and there produced by the respective parties, and "also from the objections and exceptions severally taken, and "by the terms of the regulations and ordinances, made on the "subject of the navigation of neutral vessels in time of war, *the "said ship and cargo must be considered as enemy's property*, and as "such confiscated to the use of the republic? Or whether, on "the contrary, *the said ship and her cargo must be considered as "Swedish property, and restored to the defendants?*"

"Whether it was to be confiscated, according to that statement, depended as they say, on the question, Whether it was the property of enemies or of neutrals? If it was property of enemies, then it was to be confiscated, but if the property of neutrals, it was to be restored to the defendants. Then we find them determine, that it is to be confiscated for the benefit of the republic. Now we must strain very hard to make them contradict themselves in pronouncing the sentence of condemnation, if we say that they did not mean to determine any thing with respect to the property, when at the same moment they said, *the sentence depended entirely on the question of property.* It is said it appears from one of the reasons of their decision, that they must have proceeded on the ground of their own ordinance, particularly on the ordinance of 1778, which declares, "that the circumstance "of having a supercargo or chief officer on board belonging to "an enemy will be a sufficient ground of condemnation." Now, supposing for a moment, it was chiefly, for certainly it was not solely, through that medium, that they arrived at the conclusion that it was enemy's property, would that have been sufficient to authorise us to treat the sentence as inconclusive?

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"Supposing they had stated the facts of the case, without any reference to the ordinance, could any man say that these facts were so irrelevant to the conclusions they have drawn of enemy's property, that a court of common law would have thought itself at liberty to go into the question, and see *whether the conclusion was warranted or not?* The court of King's Bench has always disclaimed such a jurisdiction. Then does it vitiate the sentence, that a court of competent jurisdiction has said there is an ordinance, which warrants and supports such a sentence? These ordinances have been misunderstood; sometimes by the courts of Admiralty themselves in *France*, and even (sometimes) by the courts in this country. The courts of Admiralty in *France* have sometimes considered these ordinances as making the law, and as binding on neutrals, and therefore have sometimes declared in the same breath that the property was neutral, and yet that it was liable to condemnation. Whereas all that was meant by those ordinances, was to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When *Lewis* the 14th published the famous ordinance of 1681, nobody thought that he was undertaking to legislate for *Europe*, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in *France*. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet as the tribunals which administer that law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain principles of decision, partly for the purpose of giving an uniform rule to their own courts, and partly for the purpose of apprizing neutrals what that rule was. And it was truly observed at the bar in the course of the argument, that it has been matter of complaint against us, (how justly is another consideration,) that we have no such code, by which neutrals may learn how they may protect themselves against capture and condemnation. Now this court in this case seems to me to have well and properly under-

underſtood the effect of their own ordinances. *They have not taken them as poſitive laws binding on neutrals, but they refer to them as eſtabliſhing legitimate preſumptions, from which they are warranted to draw the concluſion, that is neceſſary for them to arrive at, before they are entitled to pronounce a ſentence of condemnation.*

"Suppoſing they had only ſtated the facts, as they are now before us, are they to be conſidered as ſo irrevelant, that a court of common law would ſay, "This ſentence is repugnant "to juſtice, and is unwarranted on the ground on which it has proceeded?" [The Maſter of the Rolls here enumerated the facts appearing on the *French* ſentence, ſuppoſing them to have occurred in a *Britiſh* court of Admiralty, and then proceeded.] "Suppoſing all theſe circumſtances to be brought before a court of Admiralty in this country, I think it would be queſtionable, whether they would have permitted further proof: I apprehend the property would hardly have eſcaped condemnation in the firſt inſtance. What is the reſult of all the caſes that have been determined? From them all, Mr. Juſtice *Le Blanc* collects this principle, namely, *that a ſentence of a court of Admiralty is concluſive as to all it profeſſes to decide.* Now is it poſſible to ſay, that this Court did not profeſs to decide, whether this was or was not enemy's property. It was the only queſtion they did profeſs to decide, for there is no other queſtion ſtated by them upon which their deciſion could proceed, except that of, *Whether the property belonged to enemies or neutrals?* And therefore we do not only not contradict any caſe, that has been decided, by affirming the judgment of the Court below; but we are bound ſo to do, by all the principles of theſe caſes: and we ſhould contradict them if we did not affirm the ſentence of the Court of *Madras*."

Vide his opinion in Pollard v. Bell.

Lord *Glenbervie*.—"I only wiſh to make one obſervation on the caſe of *Pollard* v. *Bell*. It ſeems quite otherwiſe as to the fact in that caſe, from this which has been ſo ably ſtated here; and I entirely concur in opinion, as it has been now delivered. In *the caſe of Pollard* v. *Bell, the French court did not profeſs to go on the ground of enemy's property. Here they do profeſs to go on the ground of enemy's property.* Whether they ought or ought not to have come to this concluſion is another queſtion, but it is

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clear that in *Pollard* v. *Bell*, that particular court did not do so: it did not decide on the ground of enemy's property or not; but they declare merely, that the ship is confiscated because she had a belligerent captain or supercargo on board. Now that being the case, and the sentence not having so professed to proceed, the very first fact that was stated in that case was, that *the ship was neutral property*. The warranty was on the ship, though the insurance was on the goods on board; that being so, it appears that that case is not at all on the facts of it, resembling this."

Sir *William Scott*.—"From the case of *Pollard* v. *Bell*, it appears clearly, that the *French* Court of Admiralty had been guilty of great inattention in their own edicts; but by this inaccuracy they brought the facts out distinctly to the view of an *English* court of common law, and thereby enabled them to give the decision they had given." Judgment affirmed.

Oddy v. Bovill, 2 East's Rep. 473.

In a still more recent case, one of the points was, as to the conclusiveness of an Admiralty sentence. Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* said, that, after the repeated determinations on the subject, they could not allow the question to be again argued, unless the matter could be carried by appeal to the House of Lords, which, in the present case, it could not be, from the shape in which that cause stood before the court.

Lothian & another, v. Henderson and another, 3 Bos & Pull. 499.

But the point was at that very time depending in the House of Lords, upon an appeal from *Scotland*, and upon the second hearing of which, all the Judges were summoned. I was one of the counsel, and, by the express order of their lordships, in order to set this point at rest for ever, we were desired to argue at the bar the question of the admissibility in evidence of a sentence of a foreign Court of Admiralty, in an action upon a policy of insurance, in order to falsify a warranty of neutrality. And after mature deliberation, although there was some difference of opinion about some special circumstances, all the Judges were unanimous in declaring, that after the continued practice which had taken place from the earliest period, in which, in actions on policies of insurance, questions had arisen on warranties, to admit such sentences as evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purpose to decide directly, it was too late to examine the practise of admitting them

to

to the extent, to which they had been received, ſuppoſing that practice might have at firſt appeared to have been doubtful, upon the argument, that, on the authority of thoſe deciſions, men had acted for a long ſeries of years, and entered into contracts of aſſurance in this country, with a perfect knowledge of ſuch deciſions, and in expectation of the queſtions ariſing out of ſuch contracts, to which ſuch deciſions are applicable, being ruled by them. And as to the ſuppoſed uncertainty that had prevailed in our Courts upon the conſtruction of foreign ſentences, Lord *Alvanley*, Chief Juſtice of the Court of Common Pleas, ſaid the doctrine laid down in *Kinderſley* v. *Chaſe* (ſupra) appeared to him beſt calculated to do away that uncertainty. CHAP. XVIII.

Lord *Ellenborough*, Ch. J. of the King's Bench, who was neceſſarily abſent at *Guildhall* when the Houſe of Lords decided the cauſe of *Lothian* v. *Henderſon*, but whoſe concurrence in the judgment then pronounced was declared by Lord *Eldon* (Lord Chancellor), had ſoon after an opportunity of declaring from the bench of his own court what he conceived to be the effect of that deciſion. In delivering the judgment of the Court in *Bolton* v. *Gladſtone*, his Lordſhip ſaid, "Since the judgment of "the Houſe of Lords in *Lothian* v. *Henderſon*, it may now be "aſſumed as the ſettled doctrine of a Court of *Engliſh* law, that "all ſentences of foreign Courts of competent juriſdiction to "decide queſtions of prize, are to be received here as conclu-"ſive evidence in actions upon policies of aſſurance, upon "every ſubject immediately and properly within the juriſ-"diction of ſuch foreign Courts, and upon which they have "profeſſed to decide judicially." Bolton v. Gladſtone, 5 Eaſt. 155.

But they muſt decide upon the point diſtinctly, in order to affect a warranty or repreſentation in a policy of inſurance. That they meant to decide the point is not to be collected by inference or argument, but by ſpecific affirmation. Lord *Ellenborough* ſo declared on the trial of an action on a policy of inſurance on the ſhip *Juno*, *repreſented as an* American, at and from *London* to *Africa*, during her ſtay and trade there, and from thence to her port or ports of diſcharge in the *Weſt Indies*. Fiſher v. Ogle, Sittings aft. Trin. 1808. 1 Camp. N. P. Caſ. 418.

The ſhip was captured by a *French* privateer, carried into *Martinique*, and there condemned in the Vice-Admiralty

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Court. To falsify the representation of neutrality, the defendant now gave in evidence the sentence of condemnation. This stated, "that it resulted evidently from the papers on "board; that the expedition of the said ship *Juno*, her cargo, "and the operations of her captain on the coast of *Africa*, "were *for account of the brothers* Geddes, *merchants of* London, "*who had, to masque the* English *property of this outfit, borrowed the* "American *flag and passport of the said ship* Juno, *and taken for* "*their agent and partner in this expedition Captain* Fischer, *fur-*"*nished with a certificate of a citizen of the United States.*" The sentence afterwards went on to declare as good and valid prize the slave ship *Juno*, and to confiscate the said ship and her cargo to the profit of the captors, without stating any specific grounds for the condemnation.

Lord *Ellenborough*. "We shew a sufficient respect for *French* sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not *American*; and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider every thing as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not *American*, although such an inference might be drawn from certain indirect statements in the sentence now presented to us." Verdict for the plaintiff.

Mich. T. 49 G. 3.

In the ensuing term a motion was made for a new trial: and it was contended by the counsel for the defendant, that it necessarily resulted from the terms of the sentence of the *French* Admiralty Court, that the Ship *Juno* and her cargo were not *American*, although this was not positively averred in any part of it; and that, according to the principle of former decisions, the sentence of a foreign Court of competent jurisdiction must be taken as conclusive evidence of the facts upon which it evidently proceeds.

Lord *Ellenborough*. "I must look at the adjudicative part of the sentence; and there I find nothing distinctly stated as to the ship

ſhip or her cargo not being *American*. Is there any caſe in which it has been held that Judges muſt fiſh for a meaning, when a ſentence of this kind is produced to them. Here the foreign Court ſeems not to have any ſettled opinion upon the ſubject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overſtrained comity that theſe ſentences are received as concluſive evidence of the facts which they poſitively aver and upon which they ſpecifically profeſs to be founded.

The other Judges were of the ſame opinion, and the rule was refuſed.

The general reſult of all theſe caſes ſeems to be this; that where a man has warranted, by his contract of inſurance, thas his property is neutral, and the belligerent country condemns that very property as belonging to an enemy, however abſurd that deciſion may be, this is concluſive evidence that the warranty contained in the contract is falſe: but if the belligerent country condemn as prize, not adverting to the queſtion of neutrality at all, but ſtating the ground to be a violation of ſome rule, which they have adopted for their own government in the deciſion of queſtions of prize, it may or may not be a juſt ground of condemnation as between the belligerent and the neutral, but it cannot at all operate to prove the truth or falſehood of a fact, aſſerted in a contract of inſurance, and which may be perfectly true, quite conſiſtently with the juſtice of their deciſion. The following caſe proceeds entirely on this principle; for the *French* ſentence does not once mention the queſtion of neutrality.

Calvert v. Bovill, 7 Term Rep. 523.

In an action on a policy of inſurance on the captain's goods and private adventure, warranted *American* property, on board the ſhip *Friends*, at and from *London* to *Virginia*, a ſentence of a *French* Court of Admiralty was produced, which was to the following effect: "Foraſmuch as the true deſtination of the "ſhip was for the *Engliſh* iſlands, having been hired and loaded "at *London*, and that there has been found on board her 80 bar-"rels of gunpowder; the court declares the ſaid brig *Friends*, "together with her cargo, *a good prize*."

The court of King's Bench held that this ſentence was not concluſive againſt the warranty of neutrality, the facts of the caſe

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case and the reasons expressly given, leading to a contrary conclusion. If the sentence, indeed, had condemned the goods, because they were the property of an enemy, that judgment would have been conclusive, but they have given other reasons for their sentence.

The following case upon the forfeiture of neutrality has been as to one of the main points of it, namely the right of nations at war, to search neutral ships, overturned by a decision of the High Court of Admiralty, and also by one in the Court of King's Bench.

Salloucci v. Johnson, B. R. Hil. 25 Geo. III.

It was an action brought upon a policy of insurance on the ship *Thetis*, a *Tuscan* ship, *warranted neutral*. At the trial a verdict was found for the plaintiffs, subject to the opinion of the Court, upon a case stating, That the plaintiffs were *Tuscan* subjects resident at *Leghorn*, and the sole owners of the ship in question: that the ship, having *neutral goods* on board consigned to *London*, was captured off the coast of *Barbary* by a *Spanish* vessel. That she was carried into *Spain*, and there condemned as prize; which sentence upon appeal to a superior court, was reversed: but upon further appeal, the last sentence was reversed, and the first confirmed. That the grounds of condemnation were two; 1st, That the ship *Thetis* refused to be searched, and resisted with force, having fired at the ship of the *Spaniard*, and continued firing, after the *Spanish* colours were hoisted: 2d, That the *Thetis* had no charter-party on board. The captain answers these two grounds thus: 1st, That he resisted and fired, the *Spaniard* having hailed him under false colours: 2d, That he had taken the goods on board by the piece, and that she was a general ship; in which case a manifesto was sufficient, without a charter-party. The sentence of the last court admits the ship to be neutral; for it states it to be "the ship *Thetis*, a *Tuscan* ship, *&c.*" but condemns her as good and lawful prize.

Lord *Mansfield* was absent at the argument of this case.

Mr. Justice *Willes*.—"This is clearly a neutral ship. Something was said in argument about barratry; but I do not think the act of the captain in this case amounts to that offence. The second

ſecond ground of condemnation is given up by the counſel; and the remaining queſtion is, whether the captain has been guilty of ſuch a breach of neutrality, as ſhould affect the owners. If a ſhip be neutral, and ſhe be ſtopped, thoſe, who ſtop her, muſt pay for the detention. But it is ſaid ſhe muſt ſtop to be ſearched. I find no authority for ſuch a poſition. Beſides, the circumſtances are very ſuſpicious. The captain ſeems to have acted properly. Stoppage is always at the peril of the captors."

Mr. Juſtice *Aſhhurſt*.—"I take the principle laid down at the bar to be true, that a ſhip warranted neutral muſt conduct herſelf ſo as not to forfeit her neutrality. But the facts of this caſe do not admit of the application. I do not find, that a neutral ſhip muſt ſubmit to be ſearched. It is rather an act of ſuperior force, always reſiſted when the party is able; and the right falls within this poſition, that the ſearcher does it at his peril. If he find any thing contraband, or the property of an enemy, he is juſtified: if not, he pays coſts. Is there any thing to juſtify the ſearch in this caſe? Certainly not, for the cargo was neutral. As to the next queſtion, her not having a charter-party, this clearly is not required by the law of nations; and it appears from the caſe that ſhe was a general ſhip, and although it may be contrary to a *particular* ordinance of *Spain* to ſail without a charter party, other nations are not bound to take notice of ſuch ordinance, unleſs in virtue of ſome treaty ſubſiſting between two ſtates, by which they ſubmit to be bound by ſuch ordinance. That is not the caſe here, and therefore it falls within one of the perils inſured againſt."

Mr. Juſtice *Buller*.—"It is not neceſſary to give an opinion as to barratry; but I take it to mean a wilful act of the captain to the injury of the owners. This would have been barratry, if it had been an act, which forfeits the neutrality. I do not agree that the property muſt continue neutral during the whole voyage. If it be neutral at the time of ſailing, it is ſufficient; and if a war break out next day, the underwriter is liable. The anſwer given to the claim of ſearch is concluſive, that the party does it at his peril; juſt like the caſe of Cuſtom-houſe officers. The practice of the Admiralty confirms it; for they give coſts in caſes of improper detention: which they would not do, if neutral ſhips were, at all events, liable to be ſtopt. Detention by particular ordinances,

Vide ſupra.

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ordinances, which do not form a part of the law of nations, is a risk within the policy. At first I compared this case in my own mind to that of an illegal voyage; but they are no way similar; for a ship is only bound to take notice of the laws of the country she sails from, and of that to which she sails; but not the particular ordinances of other powers." Judgment was accordingly given for the plaintiff.

Garrells v. Kensington. 8 Term Rep. 230.

This case, thus decided, came under the consideration of the Court of King's Bench in the year 1799. It was an action on a policy on goods in the ship *Dispatch*, warranted *Danish ship and property*. The loss was alleged to be by capture. A sentence of a *British* Court of Admiralty was produced, stating, that the said neutral ship *Dispatch*, with the cargo, being *Danish* property, had been under the authority of the law of nations and of war, and agreeably to existing treaties stopped and detained by the commander of one of his majesty's ships, and by him sent towards the port of *Mole S. Nicholas*, *for the purpose of being legally examined*, under the command of *Barrett*, a midshipman, and two seamen; and that on the near approach to the port, the master, supercargo, and crew of the said ship, had, *in direct violation and breach of their neutrality as Danish subjects*, *and contrary to the law of nations and the faith of treaties*, forcibly rescued and taken and kept possession thereof till again captured by a *French* privateer, and she was again captured by one of his majesty's ships; and the said neutral ship and cargo were therefore adjudged good prize.

The Court was of opinion, that the sentence of the Court of Admiralty was conclusive that this vessel had so conducted herself as to forfeit her neutrality; by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the question concerning the right of searching neutrals, it was said by the Court, that before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations; and that such right was supposed to be founded on reason. Judgment was given for the defendant.

The Court, however, in the above case, said, they did not mean to overturn the case of *Saloucci* v. *Johnson*, for in that case the Court of Admiralty had not adjudged, as in the present case, that

that the ſhip had forfeited her neutrality. But the general point there mentioned that a neutral ſhip need not ſubmit to be ſearched, cannot be ſupported; for it is laid down in *Vattel*, that this right clearly exiſts, without which the commerce of contraband goods could not be prevented.

Vattel, book 3. ch. 7. f. 114.

Beſides which, in a late caſe in the Court of Admiralty, Sir *William Scott* thus ſtates the law: "That the right of viſiting and ſearching merchant ſhips upon the high ſeas, whatever be the ſhips, whatever be the cargoes, whatever be the deſtinations, is an inconteſtible right of the lawfully commiſſioned cruizers of a belligerent nation; becauſe till they are viſited and ſearched, it does not appear what the ſhips, or the cargoes, or the deſtinations are; and it is for the purpoſe of aſcertaining thoſe points, that the neceſſity of this right of viſitation and ſearch exiſts. This right is ſo clear in principle that no man can deny it, who admits the legality of maritime capture; becauſe if you are not at liberty to aſcertain by ſufficient enquiry whether there is property that can legally be captured, it is impoſſible to capture. Even thoſe who contend for the inadmiſſible rule, *that free ſhips make free goods*, muſt admit the exerciſe of this right at leaſt for the purpoſe of aſcertaining whether the ſhips are free ſhips or not. The right is equally clear in practice, for practice is uniform and univerſal upon the ſubject. The many *European* treaties which refer to this right, refer to it as pre-exiſting, and merely regulate the exerciſe of it. All writers upon the law of nations unanimouſly acknowledge it, without the exception even of *Hubner* himſelf, the great champion of neutral privileges. In ſhort, no man in the leaſt degree converſant in ſubjects of this kind, has ever, that I know of, breathed a doubt upon it. The right muſt unqueſtionably be exerciſed with as little of perſonal harſhneſs and of vexation in the mode as poſſible; but ſoften it as much as you can, it is ſtill a right of force, though of lawful force, ſomething in the nature of civil proceſs, where force is employed, but a lawful force, *which cannot lawfully be reſiſted*." In another place, this very learned perſon adds, "The penalty for the violent contravention of this right is the confiſcation of the property ſo withheld from viſitation and ſearch (*a*)."

The Maria, Paulſen, Maſter, decided the 11th June 1799, and the report publiſhed by Dr. Robinſon.

(*a*) I am ſorry that I cannot tranſcribe more of this judgment, ſo fraught with learning, and ſo eloquent in its compoſition: but it is the leſs to be lamented, as Dr *Robinſon* has gratified the public by publiſhing it entire, as pronounced, in a pamphlet intituled *a Report of the Judgment, &c. on the Swediſh Convoy.*

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These are the cases which have been decided, relative to the judgments of foreign courts being conclusive, and the effects which they have upon the contract of insurance: and from all of them it should seem, that this general doctrine may be collected: That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties; or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding, and the courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned; there evidence will be allowed in order to explain. And if the sentence upon the face of it be founded upon partial ordinances alone, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice *Buller*, any detention, by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.

Thellusson v. Sheddon, 2 New Rep. 228. and see Stat. 43 Geo. III. ch. 160. § 40.

If an insured declare upon a total loss by capture, and after proving a capture shew that a re-capture took place, upon which proceedings were had in the Admiralty, the Court of Common Pleas held he cannot recover even the amount of the salvage, proceedings and sale from the insurers, without proving the proceedings in the Admiralty under the seal of that Court, if the insurer chuses to insist upon it.

CHAPTER THE NINETEENTH.

Of Return of Premium.

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HAVING in ſeveral chapters ſpoken fully of the various caſes, in which policies of inſurance are either abſolutely void, or are rendered of no effect by the failure of the inſured in the performance of ſome of thoſe conditions, which he had taken upon himſelf: the next object of our inquiry will be, in what caſes, and under what circumſtances, there ſhall be a return of premium.

In all countries, in which inſurances have been known, it has been a cuſtom, coeval with the contract itſelf, that where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus premium; or if it happen that goods are inſured to come in certain ſhips from abroad, but are not in fact ſhipped, the premium ſhall be returned. If the ſhip be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the inſured is not, it ſhould ſeem the latter will be entitled to have his premium reſtored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it uſually is) *loſt or not loſt*, I think in that caſe the underwriter ſhould retain; becauſe under ſuch a policy, if the ſhip had been loſt, at the time of ſubſcribing, he would have been liable to pay the amount of his ſubſcription. The parties themſelves frequently inſert clauſes in the policy, ſtating, that upon the happening of a certain event, there ſhall be a return of premium. Theſe clauſes have a binding operation upon the parties; and the conſtruction of them is a matter for the court, and not for the jury, to determine.—In ſhort, if the ſhip, or property inſured, was never brought within the terms of the written contract, ſo that the inſurer never has run any riſk, the premium muſt be returned.

Loccenius de jure marit. l. 2. c. 5. ſ. 8.

1 Mag. 90.

Dougl. 268.

1 Vef. 319.

The principle upon which the whole of this doctrine depends, is ſimple and plain, admitting of no doubt or ambiguity. The riſk

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Pothier, n. 179. 3 Burr. 1240. Roccus, Not. 88. Cowp. 668.

risk or peril is the consideration for which the premium is to be paid: if the risk be not run, the consideration for the premium fails; and equity implies a condition, that the insurer shall not receive the price of running a risk, if, in fact, he runs none. It is just like the contract of bargain and sale; for if the thing sold be not delivered, the party who agreed to buy, is not liable to pay. Thus to whatever cause it be owing, that the risk is not run, as the money was put into the hands of the insurer, merely for the risk of indemnifying the insured, the purpose having failed, he cannot have a right to retain the sum so deposited for a special cause.

Martin v. Sitwell, 1 Show. 156.

Accordingly in an action of *indebitatus assumpsit* brought by the plaintiff for 5*l.* received by the defendant to the plaintiff's use, where the general issue was pleaded; it appeared in evidence, that one *Barkdale* had made a policy of insurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that *Barkdale* had no goods then on board, and so the policy was void. To this action two objections were taken: 1st, That it should have been brought in *Barkdale*'s name, which was over-ruled. 2dly, That this ought to have been a special action on the custom of merchants. Lord Chief Justice *Holt* cited a case of money deposited upon a wager concerning a race, that the party winning might bring an action of *indebitatus assumpsit*, for money received to his use; for now by the subsequent matter it is become as such. And as to the case in question, the money is not only to be returned by the custom, but the policy is made originally void, the party, for whose use it was made, having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was received originally to the plaintiff's use. And so judgment was given for the plaintiff.

I cite this case for two purposes; because it serves to shew in what form of action the plaintiff ought to demand a return of premium: and it also points out, that as early as the beginning of the reign of *William & Mary*, the true principle, on which the premium ought to be returned, was fully established. It was said in the introduction to this chapter, that clauses are frequently inserted in policies of insurance, containing conditions,

ditions, on the performance or non-performance of which, the premium is returnable; and that to decide upon the conſtruction of ſuch conditions is the province of the Court, and not of the jury. Such a caſe occurs, which may properly be mentioned here.

Simond and another v. Boydell, Dougl. 255.

This action was brought againſt an underwriter, for a return of premium. The material part of the policy was in theſe words: "At and from any port or ports in *Grenada* to *London*, "on any ſhip or ſhips that ſhall ſail on or between the firſt of "*May* and the firſt of *Auguſt* 1778, at 18 guineas *per cent.* to "return 8*l. per cent. if ſhe ſails from any of the Weſt India Iſlands*, "*with convoy for the voyage, and arrives.*" At the bottom there was a written declaration that the policy was on ſugars (the muſcovado valued at 20*l.* per hogſhead) for account of *L. Q.* being on the firſt ſugars which ſhall be ſhipped for that account. The ſhip the *Hankey* ſailed with convoy, within the time limited, having on board 51 hogſheads of muſcovado ſugar, belonging to *L. Q.* She arrived ſafe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed ſeldom beyond *Portſmouth*. After ſhe had parted with the convoy, ſhe ſtruck on a bank called the *Pan Sand*, at *Margate*, and 11 of the 51 caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off the bank, and proceeded up the river, arrived ſafe in the port of *London*, and was reported at the cuſtom-houſe. The ſugars ſaved were taken out at *Margate*, and, after undergoing a ſort of cure, by a perſon ſent from town for that purpoſe, they were carried to *London* in other veſſels; and the 40 hogſheads being ſold, produced 340*l.* inſtead of 800*l.* which was their valuation in the policy. The defendant had paid into court the value of the ſugars loſt, and a return of 8*l. per cent.* on 340*l.* The plaintiffs inſiſted, that they were entitled to have 8*l. per cent.* alſo returned on the *valued* price of the eleven hogſheads of ſugar which were loſt, and on the difference between what the remaining forty hogſheads produced, and their valued price. At the trial, before Lord *Manſfield*, the plaintiffs had a verdict to the full amount of their demand. The chief queſtion, upon the motion for a new trial, was, To what the word "*arrives*" was intended to apply?

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Lord *Mansfield*.—"The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate; but length of time, and a variety of discussions and decisions, have reduced it to certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made, which has not created doubts on the construction of it. Here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, "If it turn out that the ship departs with convoy, I will "return part of the premium." But a ship may sail with convoy, and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, that would not be a breach of the condition; but to guard against that risk, the insured adds, in policies of the present sort, "the ship must not only sail with convoy, but she must "*arrive*, to entitle me to the return." The words, *and arrives*, do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews, either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction, contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made, unless *all* the goods arrived *safe*, they would have said, "if the ship arrive *with all* "*the goods*," or "*safely with all the goods*." The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern

Vide ante, c. 18.

is, that in the events which have happened, the war risk has been rated too high."

Mr. Justice *Wilkes*, and Mr. Justice *Ashhurst*, were of the same opinion.

Mr. Justice *Buller*.—"I am of the same opinion. *The question is for the decision of the Court, not of a jury*, since it arises on the construction of a written instrument. What gives rise to an increase of the premium? The danger of capture. When that danger is diminished, the construction must be, that there shall be a proportional return of premium." The rule for a new trial was accordingly discharged.

So also in a later case, where, in a policy on freight, this clause was found, "to return 10*l. per cent. if the ship sailed with "convoy and arrived;*" it was contended at the bar that, although the ship sailed with convoy, and although she arrived at her port of destination; yet as she had been captured and recaptured during the voyage, and had paid salvage to the re-captors, the plaintiffs (the assured) were not entitled to a return of premium within the true construction of the above clause.

Aguilar and others v. Rodgers, 7 Term Rep. 421.

Lord *Kenyon* delivered the unanimous opinion of the Court: I agree with the counsel for the defendant, that every arrival of the ship at her port of destination would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in *England* as the property of other persons after a capture. But in order to satisfy the meaning of the memorandum, it should be *an arrival at the destined port in the course of her voyage*. It is now too late to controvert the authority of *Hamilton* v. *Mendes*, even if we were disposed to do so, which I am not, where it was holden that though the assured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond* v. *Boydell* was decided; that case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum

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morandum import, they would have added after *arrived*, "safely "from the enemy," or some words to that effect. But the words here used are not equivocal; and we ought not to depart from them: it would be attended with great mischief and inconvenience if in construing contracts of this kind we were not to decide according to the words used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of *London*, the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict obtained by the plaintiff ought not to be set aside (*a*).

Cowp. 668.

By the law of *England*, it has been clearly settled, that whether the cause of the risk not being run, is attributable to the *fault*, *will*, *or pleasure* of the insured, still the premium is to be returned. Foreign writers have in some measure differed in opinion upon this point; and it may not be improper to observe how far they vary or agree with our own. The *Italian* writers agree with us, that the contract in question is conditional, and that the risk is the very essence and main spring of the whole. But still they insist and contend, that it is not lawful for the assured, *by their own act*, to break the contract; and that in such a case, the insurer is not obliged to return the premium.

Audley v. Duff, 2 Bos. & Pull. 111. So where the words were, *if she depart from Portugal and arrive*. Everard v. Hollingworth, 2 Bos. & Pull. 111. in the note.

(*a*) In a late case in the Common Pleas, there was the following clause for a return of premium in a policy "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, to return 6*l. per cent. if she sail with convoy from the coast of Portugal and arrive.*" The ship sailed *from Oporto* under the protection of a sloop and cutter *appointed* to protect the trade of that place to *Lisbon*, from whence it was to sail under a larger convoy to *England*. In the way to *Lisbon*, the fleet was dispersed, and this ship ran for *England* and arrived. It was contended that this ship had not sailed *from* the coast of *Portugal* with convoy. But the Court held, that having sailed from *Oporto*, with a convoy duly appointed, with a *bonâ fide* intention to proceed to *England*, though by desire of the Admiral, *Lisbon* was to be taken in the way, the condition, on which the return of premium was to be made, had been performed.

Kellner v. Le Mesurier, 4 East, 396. See ante p. 326. on another point.

In all these cases where the words *and arrived* follow other conditions, those words annex a condition which overrides all the other stipulations; and no arrival at any intermediate stage will do, unless the vessel arrives at its ultimate port of destination.

They

They hold indeed, that if the voyage be put an end to by any accident, such as the ship being burnt, or by public authority; or if more goods were *bonâ fide* insured than were actually on board: in the former cases, the whole; and in the latter, a proportional part of the premium should be returned. But if a man say he has goods on board, and insure them, knowing that he has none, they ask this question: "An assecurator te- "neatur restituere pretium, eo quod in navi non fuerunt "merces? Videbatur assecurator teneri ad restitutionem pretii "recepti: sed in contrarium est veritas, quod non solum non "teneatur pretium restituere, imo possit patere illud; et ratio "est, quia licet emptio periculi non teneat in præjudicium pro- "missoris, tamen in ejus favorem, et in præjudicium assecurati "falsa assertio bene tenet."

Roccus, Not. 15. 82. 88

Roccus, Not. 11.

Santerna, part 3. n. 22.

The *French* law-givers have, however, decided upon this point agreeably to our laws; and have accordingly, in the famous ordinances of *Lewis* the Fourteenth, inserted an article declaring, that if the voyage is entirely broken up before the departure of the ship, *even by the act of the insured*, the insurance shall be void, and the underwriter shall return the premium, reserving one half *per cent.* for his trouble. This article affords some scope to *Valin*, the very learned commentator upon these ordinances, to point out the advantages which the insured enjoys above the insurer, in being thus able to put an end to the contract, even after it is signed, which the underwriter can by no means effect. Indeed, when we consider that the premium is nothing more than the price of the perils, which the underwriters ought to run; and that the obligation to pay the premium contains this tacit condition, "I will pay *if the insurers run the risk*;" it is perfectly consistent with that principle, that when the risk is not run, whatever be the cause, the premium is not due to the insurers. Accordingly in *England*, it has always been the custom, when the policy is cancelled, to return the premium, deducting one half *per cent.*

2 Emerigon, 151. Ord. of Lew. 14. tit. Assur. art. 37.

2 Val. 93.

Pothier, Not. 179.

Molloy, l. 2. c. 7. s. 12.

The generality of the rule here established would seem to extend it even to cases of fraud on the part of the insured. But the laws of *France*, upon this subject, have declared, that the insured shall be obliged to restore to the insurer, whatever he has received from him, and also to pay him double the premium.

Ord. of Lew. 14. tit. Insur. art. 41.

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mium. This queſtion relative to a return of premium, in caſes of fraud, was very fully diſcuſſed in the chapter of fraud, and all the caſes fully cited; to that chapter therefore I muſt now refer the reader.

Vide ante, c. 10. p. 283.

Some of the ſtatutes for preventing the exportation of wool, and other ſtaple commodities of the kingdom, and which, in order more effectually to prevent ſuch exportation, have declared policies of inſurance on thoſe articles to be null and void, have enacted that the premium ſhall not be reſtored to the inſured.

See ante, c. 13. p. 333.

19 Geo. II. c. 37. Vide ſupra, c. 14.

When a policy is void, being made without intereſt, contrary to the ſtatute of the 19th *Geo.* the Second, *if the ſhip has arrived ſafe*, the Court will not allow the inſured to recover back the premium; according to the old rule of law, *in pari delicto potior eſt conditio poſſidentis*. But in the deciſion of the caſe, in which this doctrine was held, the court ſeemed to rely much upon the diſtinction of contracts executed and executory: that this was a contract *executed*, the ſhip having arrived before the demand was made; but when a contract *executory* is to be reſcinded, it can only be done upon the equitable terms of putting all parties in their original ſituation. Mr. Juſtice *Willes* in this caſe differed in opinion from the reſt of the court, for reaſons delivered by the learned judge, and which will appear in their proper place.

Dougl. 471.

Lowry and another v. Bourdieu, Dougl. 468. Vide ante, p. 365.

The plaintiffs had lent to *Lawſon*, captain of the *Lord Holland Eaſt Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal ſum of 52,000*l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance, underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the adven- "ture *upon the goods* from the loading thereof on board the ſaid "ſhip at *Canton* in *China*, &c. and *upon the ſaid ſhip*, from and "immediately following her arrival at *Canton*, valued at 26,000*l.* "being the amount of Captain *Patrick Lawſon*'s common bond, "payable to the parties as ſhall be deſcribed on the back of this "policy: and it bears date the 16th day of *December*, 1775; "and in caſe of a loſs, *no other proof of intereſt to be required than "the exhibition of the ſaid bond: warranted free from average and "without benefit of ſalvage to the inſurer.*" At the head of the

ſubſcriptions

subscriptions was written, "*On a bond as above expressed.*" Captain *Lawson* sailed from *China*, and arrived safe with his privilege (as it is called) or adventure, in *London*, on the first of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. The insured brought this action for a return of the premium, on the ground that the policy being without interest, the contract was void. The cause came on before Lord *Mansfield*, at *Guildhall*, when his Lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo.* 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis*, was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordship's directions; but, the next morning, he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, which could never have been completed. A new trial was then moved for, and fully argued.

Lord *Mansfield*.—"It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance: mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form; but in them there is no contract of indemnity; because there is no interest on which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say; "We mean to "game; but we give our reason for it; Captain *Lawson* owes "us a sum of money, and we want to be secure, in case he "should not be in a situation to pay us." It was a hedge, but they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the Court will not assist either party; according to the well-known rule that *in pari delicto*, &c. Not that the defendant's right is better than that of the plaintiffs, but they

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must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark, by taking too long an aim."

Mr. Justice *Willes*.—"I shall make no apology for differing from the rest of the court in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering into an illegal contract. The whole was disclosed, and they *thought* there was an interest. This was a mistake; but it is a new point of law. The case, cited from precedents in Chancery, is not, perhaps, decisive, but it goes a great way; and it would be very hard that a party should lose that which he has paid under a mere mistake. I think, in conscience, the defendant ought to refund the premium."

Vide ante, c. 10.

Mr. Justice *Ashhurst*.—"I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which shews decisively that this was a gaming policy."

Mr. Justice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of *fact*. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy, without interest. There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker* v. *Chapman*, some years ago in this court, where a sum of money had been paid in order to procure a place in the *Customs*. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held that he should recover, because the contract remained executory. So, if the plaintiffs in the present case had brought their action, before the risk was over, and the voyage finished, they might have had a ground for

for their demand; but they waited till the risk, such as it was, (not indeed, founded in law, but resting on the honour of the defendant), had been completely run. It makes no difference whether the premium was paid before the voyage or after it." The rule was discharged.

And very lately it has been held upon the authority of *Lowry* v. *Bourdieu*, as not being distinguishable from it, that an action for money had and received will not lie to recover back the premium of re-assurance void by the statute of 19 *Geo.* 2. *ch.* 37. Andree v. Fletcher, 3 Term. Rep. 266. See ante, p. 372.

Lord *Mansfield*, after the rule was discharged in *Lowry* v. *Bourdieu*, said, he desired it might not be understood, that the court held, that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for, in such cases, the parties are not *in pari delicto*.

That the court, in the case of *Lowry* v. *Bourdieu*, proceeded upon the distinction between contracts executed and executory, is evident, not only from Mr. Justice *Buller*'s opinion, but is, in some measure, confirmed by what fell from Lord *Mansfield*, upon a subsequent occasion, when this case was cited; although it must be confessed, that the case about to be quoted, which was only decided suddenly at *nisi prius*, is a good deal shaken by the subsequent decision of *Andree* v. *Fletcher*.

It was an action brought upon two wagers: one of 26*l.* 5*s.* to 100*l.* the other of 13*l.* 2*s.* 6*d.* to 30*l.* that the colonies of *North America* would be admitted or acknowledged independent states, by some public official act or instrument made or executed, on the part of the king or government of *France*, at some time on or between the 1st of *February* and the 1st of *April* 1778, both days inclusive. The defendant pleaded *non assumpsit*. Upon the opening of this case, Lord *Mansfield* directed the plaintiff to be nonsuited. But the counsel for the plaintiff insisted, that he was entitled to a verdict for the premium on the genera count in the declaration, *for money had and received to his use*, which his Lordship permitted on the ground of the contract being void, and of the defendant having money in his hands, which Wharton v. De la Rive, Mich. Vac. 1782, at Guildhall.

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which he ought not to retain. For the defendant it was said, that he was entitled to keep the premium; and the case of *Lowry* v. *Bourdieu* was cited; but Lord *Mansfield* thought it did not apply, as in that case the risk had been run. The point there decided was, that an insurance being made without interest, and the premium paid, the insured shall not recover back the premium, after the ship has arrived safe. And this upon the distinction, that the contract, though not a legal one, *was executed* before the relief was applied for, and no longer *executory*.

Mackenzie and another v. Duff, B. R. Hilary Term 1799.

In a late case, the assured, having been nonsuited at the trial on the ground that the goods insured were prohibited, and that the shipment of them, under the circumstances disclosed, was a violation of the acts of navigation, insisted that they were entitled to a return of premium, and a motion was made to set aside the nonsuit. Had this case proceeded, a decision of the precise question, whether the premium is recoverable in cases of insurance effected contrary to the statute law of the realm, without reference to the distinction between contracts executed and executory, would probably have been obtained: but unfortunately the rule was discharged upon a collateral point, and the main question therefore remained undecided.

Vandyck v. Hewitt, 1 East's Rep. p. 96. See Potts v. Bell, ante, p. 316.

In a very late case, the Court of King's Bench, after a consideration of all the cases, held, that where a premium had been paid on a policy to cover *a trading with the enemy*, though the insurance was void and the underwriters not compellable to pay the loss, it could not be recovered back.

Lord *Kenyon*, in giving judgment, observed, that it was impossible to distinguish this case from the common one of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves, or the value of them. The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

Morck and another v. Abel. 3 Bos. & Pull. 35.

This point has again come under consideration in two very modern cases, both in the Court of King's Bench and Common Pleas: the decision in the latter court was prior in point of date; but in both of them the doctrine above stated was fully recognized and confirmed. In the first of them, a foreigner having made

made an insurance upon a *Danish* ship at and from *Bengal* (in which province there are some *Danish* settlements) to *Copenhagen*, and the ship having loaded at *Calcutta*, contrary to the navigation act of 12 *Car.* 2. ch. 18. s. 1. Lord *Alvanley* and Mr. Justice *Rooke*, and Mr. Justice *Chambre* relied upon the cases of *Andree* v. *Fletcher*, and *Vandyck* v. *Hewitt* (ante), and laid down the principle of their decision against the assured's right to recover the premium, as extracted from all the cases, to be, that no man can come into a *British* court of justice to seek the assistance of the law, when he founds his claim upon a contravention of the *British* laws. And a distinction having been attempted at the bar, on the ground of the party interested being a foreigner, it was answered that that could make no difference, as the navigation laws were particularly aimed against foreigners; and that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them.

So again in 1806, where an insurance on colonial produce from the *British West Indies to Gibraltar* was holden to be void, as a violation of the Acts of Navigation, the Court of King's Bench, consisting of Lord *Ellenborough*, and Judges *Grose*, *Lawrence* and *Le Blanc*, relying on all the above cases, which were quoted from the bar, decided that the premium could not be recovered. Lubbock v. Potts, 7 East. 449.

From the various cases upon the subject of return of premium, as well as from all that has already been said, it will appear, that in the *English* law there are two general rules established, which govern almost all cases. The first is, that where the risk has not been run, whether that circumstance was owing to the fault, the pleasure, or will of the insured, or to any other cause, the premium shall be returned. This rule has already been pretty fully discussed. Another rule is, that if the risk has *once* commenced, there shall be *no* appointment or return of premium afterwards. Hence in cases of deviation, though the underwriter is discharged from his engagement; yet the risk being once commenced, he is entitled to retain the premium (*a*). Cowp. 667.

(*a*) In the case of *Hogg* v. *Horner*, (ante, ch. 17.) Lord *Kenyon* being of opinion that there was a deviation, it was insisted that the assured had a right to return of premium; but Lord *Kenyon* thought there was an inception of the risk *at*, and the contract being entire, there could be no return of premium.

Though

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Though theſe rules are ſo plain and ſimple, that they ſeem to preclude all poſſibility of doubt or contention; yet there are few points in the law of inſurance, which have given riſe to a greater number of clauſes than thoſe which relate to the ſubject of this chapter.

It ought, however, to be acknowledged, that leſs litigation has taken place in thoſe inſtances where the whole of the premium is either to be retained or reſtored, than in thoſe where, from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes diviſible, and the court can ſay, "a part of the premium ſhall be retained for the "riſk run, and part ſhall be returned, as the riſk has never "commenced." This ſeems to be a refinement upon the rules juſt eſtabliſhed; but it muſt at the ſame time be admitted, that *when it can be accompliſhed*, it is a refinement perfectly conſiſtent with equity and good conſcience. The one rule has provided, that if the riſk be once begun, there ſhall be no return: but the other rule has ſaid, and equity has alſo ſaid, that a man ſhall not be paid for a riſk which he has never incurred: from whence the deduction is eaſy and natural, that if there are two diſtinct points of time, or in effect, two voyages either in the contemplation of the parties or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, although both are contained in one policy.

3 Burr. 1240.

The firſt time in which this doctrine was conſidered at any length, was in a caſe which came before the Court of King's Bench, in the year 1761.

Stevenſon v. Snow. 3 Burr. 1237. and 1 Blac. Rep. 318. S. C.

It was a ſpecial caſe reſerved at a trial at *niſi prius*, before Lord *Mansfield*, in *London*, upon an action for money had and received to the plaintiff's uſe, brought by the plaintiff, the inſured, againſt the defendant, the inſurer, for a return of part of the premium. It was an inſurance upon a ſhip, at five guineas *per cent.* loſt or not loſt, *at and from London to Halifax*, in *Nova Scotia, warranted to depart with convoy from Portſmouth*, for the voyage, that is to ſay, the *Halifax* or *Louiſburgh* convoy. Before the ſhip arrived at *Portſmouth* the convoy was gone. Notice of this was immediately given by the inſured to the underwriter; and at the ſame time he was alſo deſired either to make the long

insurance, or to return part of the premium. The jury find that the usual settled premium from *London* to *Portsmouth* is one and a half *per cent.* They also find that it *is usual* for the underwriter, in such like cases, to return part of the premium; but the *quantum* is uncertain: (And the *quantum* must in its nature be uncertain, because it depends upon uncertain circumstances.) It is stated, that the plaintiff made an offer to the defendant of allowing him to retain one and a half *per cent.* for the risk he had run on such part of the voyage as was performed under the policy, viz. from *London* to *Portsmouth.*

Lord *Mansfield.*—"I had not at the trial, nor have now, the least doubt about this question, myself. These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it. Equity implies a condition, "that the insurer shall not receive the price of running a risk, if he run none." This is a contract without any consideration, as to the voyage from *Portsmouth to Halifax;* for he intended to insure that part of the voyage, as well as the former part of it, and has not. Consequently the insured received no consideration for this proportion of his premium: and then this case is within the general principle of actions for money had and received to the plaintiff's use. I do not go upon the usage: for the usage found is only that in like cases, it is usual to return a part of the premium, without ascertaining what part. If the risk is not run, though it is by the neglect, or even the fault of the party insuring, yet the insurer shall not retain the premium. It has been objected, that the voyage being *begun* and part of the risk being already run, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire, that there can be no apportionment; for there are two parts in this contract: and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages. The practice shews, that it has been usual, in such like cases, to return a part of the premium, though the *quantum* be not ascertained. And indeed, the *quantum* must vary as circumstances vary: so that it never can have been fixed with any precise exactness. But though the *quantum* has not been ascertained; yet the principle is agreeable to the general sense of mankind."

Mr.

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Mr. Juſtice *Deniſon*.—" It is moſt equitable that the defendant ſhould only retain the premium for ſuch part of the voyage, as he has run any riſk: the inſured has a right to have the other part reſtored to him. This is agreeable to the general principle of actions for money had and received to the uſe of the plaintiff: where the defendant has no right to retain, he muſt refund it."

Mr. Juſtice *Foſter*.—" There is no conſideration for the remainder of the premium; for in the voyage from *Portſmouth* to *Halifax*, no riſk was run by the inſurer, who only inſured the voyage *with* convoy: therefore he has no right to retain the premium for this."

Mr. Juſtice *Wilmot* declared his concurrence moſt clearly and ſtrongly. " Theſe kinds of contracts," he obſerved, " are, by the writers on this head, called *contractus innominati*; and the rule, which they lay down concerning them, is, that they are to be determined *ſecundum bonum et æquum*. The jury have here found an uſage to return part of the premium in ſuch caſes; which is a ſtrong proof of the equity of the thing: and nothing can be more juſt and reaſonable. If the riſk was once begun, the inſured ſhall not deviate or return back, and then ſay, " I will go " no further under this contract, but will have my premium " returned." But upon this policy there are two diſtinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other not at all entered upon. It was a conditional contract: and the ſecond voyage was not begun; therefore the premium muſt be returned, for upon this ſecond part of the voyage, the riſk never took place at all. This is agreeable to what the writers upon the ſubject lay down; and is the right and juſtice of the caſe." The *poſtea* was delivered to the plaintiff (*a*).

Some years afterwards, the principle eſtabliſhed in the foregoing caſe was attempted to be applied to one, which it did not at all reſemble. For the following caſe was an inſurance for

(*a*) This caſe was much conſidered in a caſe of *Rothwell* v. *Cooke*, 1 Boſ. and Pul. Rep. p. 172. in the Common Pleas, but no deciſive judgment delivered on the ſubject.

twelve

twelve months at 9*l. per cent.*; and becauſe the ſhip was captured within two months after the contract was made, a return of premium was demanded, upon the principle of *Stephenſon* v. *Snow*. But the contract in this caſe was entire; the premium was a groſs ſum ſtipulated and paid for twelve months; and the parties, when they made the contract, had no intention or thought of a ſubſequent diviſion, or apportionment.

The caſe was thus:

It was an action, in the uſual form, for money had and received to the plaintiff's uſe, for a return of part of the premium. The cauſe was tried at *Guildhall*, before Lord *Mansfield*, when, by conſent, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the queſtion, Whether, under the circumſtances of the caſe, a proportionable part of the premium ought to be returned or not? If the court ſhould be of opinion that a proportionable part of the premium ought not to be returned, then a nonſuit was to be entered. It now came before the court upon a rule to ſhew cauſe, why a nonſuit ſhould not be entered; and the caſe, as it appeared from the report, was ſhortly this. The policy was on the ſhip *Iſabella*, at and from *London*, to any port or place, where or whatſoever, *for twelve months*, from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777, both days incluſive, at 9*l. per cent.* warranted free from captures and ſeizures by the *Americans*, and the conſequences thereof. In all other reſpects, it was in the common form, againſt all perils of the ſea, *&c.* The ſhip ſailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Tyrie v. Fletcher. Cowp. 666.

Lord *Mansfield*.—"It was very proper to ſave this caſe for the opinion of the court, becauſe in all mercantile tranſactions, certainty is of much more conſequence, than which way the point is decided; and more eſpecially ſo, in the caſe of policies of inſurance: becauſe, if the parties do not chuſe to contract according to the eſtabliſhed rule, they are at liberty as between themſelves to vary it. This caſe is ſtript of every authority. There is no caſe or practice in point; and therefore we muſt argue from the general principles applicable to all policies of inſurance. And I take it, there are two general rules eſtabliſhed, applicable

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applicable to this queſtion: the firſt is, that where the riſk has not been run, whether its not having been run was owing to the fault, pleaſure, or will of the inſured, or to any other cauſe, the premium ſhall be returned; becauſe a policy of inſurance is a contract of indemnity. The underwriter receives a premium for running the riſk of indemnifying the inſured, and to whatever cauſe it be owing, if he do not run the riſk, the conſideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards. For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage; yet, if it has commenced, though it be only for 24 hours or leſs, the riſk is run; the contract is for the whole entire riſk, and no part of the conſideration ſhall be returned: and yet, it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies* agreeably to the terms of the policy in this caſe, and had been taken 24 hours after the riſk was begun, by an *American* captor, there is not a colour to ſay, that there ſhould have been a return of premium. So much then is clear; and indeed, perfectly agreeable to the ground of determination in the caſe of *Stevenſon* v. *Snow*. For in that caſe, the intention of the parties, the nature of the contract, and the conſequences of it, *ſpoke* manifeſtly *two* inſurances, and a *diviſion* between them. The firſt object of the inſurance was from *London* to *Halifax*: but if the ſhip did not depart from *Portſmouth* with convoy (particularly naming the ſhip appointed to the convoy), then there was to be no contract from *Portſmouth* to *Halifax*: why then, the parties have ſaid, "we make a contract from *London* to *Halifax*, but on "a certain contingency it ſhall only be a contract from *London* to "*Portſmouth*." That contingency not happening, reduced it in fact to a contract from *London* to *Portſmouth* only. The whole argument turned upon that diſtinction. Mr. *Yates*, who was counſel for the plaintiff, put it ſtrongly upon that head; and all the judges, in delivering their opinions, lay the ſtreſs upon the contract compriſing two diſtinct conditions, and conſidering the voyage as being in fact two voyages: and it was the equitable way of conſidering it; for, though it was at firſt conſolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly upon that ground;

Vide ſupra.

ground; but it was the opinion of the whole court. There was an uſage alſo found by the jury in that caſe, that it was cuſtomary to return a proportionable part of the premium in ſuch like caſes, but they could not ſay *what* part. The court rejected this as a uſage for *uncertainty;* but they argued from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of merchants, as to the propriety of returning a part of the premium in ſuch caſes: and there can be no doubt of the reaſonableneſs of the thing. There has been an inſtance put of a policy where the meaſure is by time, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is an inſurance upon a man's life for twelve months. There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it: for the underwriter would demand double the premium for *two* years, that he would take to inſure the ſame life for *one* year only: in ſuch policies there is a general exception againſt ſuicide. If the perſon puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breaſt, that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ſhip ſhall ſail on or before the firſt of *Auguſt:*" and Mr. *Wallace* conſiders in that caſe, that the whole policy would depend upon the ſhip ſailing before the ſtated day. I do not think ſo. On the contrary, I think with Mr. *Dunning*, that cannot be. A loſs in port *before* the day appointed for the ſhip's departure, can never be coupled with a contingency after the day: but if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of the determination of *Stevenſon* v. *Snow:* and that there were two parts, or contracts of inſurance with diſtinct conditions. The firſt is, I inſure the ſhip in port, provided ſhe is loſt in port, before the 1ſt of *Auguſt:* and 2dly, if ſhe be not loſt in port, I inſure her then during her voyage, from the 1ſt of *Auguſt* till ſhe reaches the port ſpecified in the policy. The loſs in port muſt happen, before the riſk upon the voyage could commence: and *vice verſa;* the riſk in port muſt ceaſe the moment the riſk upon the voyage began. Let us ſee then, what the agreement of the parties is in the preſent caſe. They might have inſured from two months to two months, or in any leſs or greater proportion, if they had thought

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proper so to do: but the fact is, that they have made *no division of time at all*; but the contract entered into is one entire contract from the 19th of *August* 1776, to the 19th of *August* 1777; which is the same as if it had been expressly said by the insured, "If you the underwriter will insure me for twelve months, I "will give you an *entire* sum; but I will not have any appor- "tionment." The ship sails, and the underwriter runs the risk for *two* months. No part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived."

Mr. Justice *Aston*.—"This case depends upon the words of the policy: and I am of opinion, it is one entire contract at a certain gross sum of 9*l. per cent.* for a certain period of time, *viz.* twelve months; and that no division is to be implied. The determination in *Stevenson* v. *Snow* went expressly upon this consideration, that there were *two distinct voyages*, and no consideration received by the insured for the premium upon the second voyage: and there certainly was not; for there never was any point of time, when any risk was run from *Portsmouth*. In *Bond* v. *Nutt*, the losses insured against were distinct, and unconnected with each other. 1st, A loss of the ship in port, if any should happen there. 2dly, A loss in the passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance on a life, the sum is entire, and time is entire for the whole year. So in this case I think the contract is one entire contract: and therefore that there ought to be no return of premium."

Vide ante, c. 18. p. 432.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* were of the same opinion.

Per Curiam. Let a nonsuit be entered.

In a subsequent case, the Court of King's Bench adopted the same rule of decision, where the ship was insured for 12 months, and the risk ceased at the end of two. A distinction was attempted to be made, because in this case, the whole premium 18*l.* was acknowledged to be received from the insured *at the rate of* 15 *shillings per month*: and this, it was insisted, evidently shewed

ſhewed the parties intended the riſk to continue only from month to month. This objection was, however, over-ruled; the Court being of opinion, that the caſe laſt reported decided this; and that the 15*s.* per month was only a mode of computing the groſs ſum. The caſe was in ſubſtance as follows:

Loraine v. Thomlinſon, Dougl. 585.

It was an action tried before Lord *Loughborough*, at the aſſizes for the county of *Northumberland*, in which the plaintiff declared, —That the defendant, in conſideration that the plaintiff at his requeſt had underwritten ſeveral policies of inſurance as to certain ſums of money therein ſubſcribed againſt his name, on the ſhips, merchandizes, and other things therein reſpectively ſpecified, without receiving the full premiums therein mentioned, undertook and promiſed to pay the plaintiff ſo much money, as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40*l.* There was another count for 40*l.* for money had and received by the defendant to the plaintiff's uſe. The defendant pleaded non aſſumpſit as to all except the ſum of 3*l.* upon which plea iſſue was joined; and as to the 3*l.* he pleaded a tender, and paid that ſum into court. Upon the plea of tender, iſſue was alſo joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other iſſue, for the ſum of 15*l.* ſubject to the opinion of the Court, whether he was entitled to recover that ſum of 15*l.* or the ſum of 3*l.* only, upon a caſe, which ſtated, in effect, as follows: The plaintiff had underwritten 200*l.* on a policy effected at *Newcaſtle* (which was ſet forth *verbatim* in the caſe), whereby the ſhip the *Chollerford* was inſured, againſt capture by the enemy for *twelve months*, in the coaſting trade between *Leith* and the *Iſle of Wight*; beginning the 13th of *March* 1779, and ending the 13th of the ſame month, 1780. In the body of the policy it was ſtated, "That "the aſſurers confeſſed themſelves paid the conſideration due "unto them by the aſſured, *at and after the rate of* 15*s. per cent.* "*per month.* At the bottom, oppoſite to the plaintiff's ſubſcrip- "tion, was written, premium received 16th of *March* 1779;" and on the back was indorſed, "*Newcaſtle*, 15th of *March* 1779 "Mr. *John Gaul Tomlinſon*, on his ſhip the *Chollerford*, himſelf "maſter, *for twelve months*, in the coaſting trade, at and be- "tween *Leith* and the *Iſle of Wight*, beginning the 13th of "*March* 1779, and ending the 12th of *March* 1780. Ene-

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" my only. *At 15s. per cent. per month, 18l.*" The premium was not paid, though expreſſed in the policy to have been paid, it being the uſage in *Newcaſtle* not to pay the preminm at the time of making the inſurance; but at various times after the policies are effected, and ſometimes, not till twelve months after. The ſhip was loſt in a ſtorm, within the firſt two of the twelve months for which the inſurance was made, and the defendant tendered to the plaintiff 3*l.* as the premium for two months. The caſe then ſtates contradictory evidence given by witneſſes on both ſides, as to what had been done at *Newcaſtle* in ſimilar caſes; but which I forbear to ſet down; becauſe the Court of King's Bench was afterwards of opinion, that it ought not to have been received.

After the counſel for the defendant had been heard, the plaintiff's counſel was prevented by the Court from proceeding.

Lord *Mansfield*.—" This is a mere queſtion of conſtruction, on the face of the inſtrument, and therefore parol evidence ſhould not have been admitted to explain it It an inſurance for twelve months, for one groſs ſum of 18*l.* They have calculated this ſum to be at the rate of 15*s. per* month. But what was to be paid down? Not 15*s.* for the firſt month, and ſo from month to month; but 18*l.* at once. Two caſes have been mentioned. *Stevenſon* v. *Snow* was decided on the ground of there *being two voyages*. *Tyrie* v. *Fletcher* is directly in point againſt the defendant. There are two principles in theſe caſes; 1ſt, If the riſk has never begun, the whole premium is to be returned, becauſe there was no conſideration: 2d, When the riſk has begun, there ſhall never be a return, although the ſhip ſhould be taken in 24 hours."

Mr. Juſtice *Aſhhurſt*.—" The 15*s.* per month is only a mode of computing the groſs ſum."

Mr. Juſtice *Willes*, and Mr. Juſtice *Buller* concurring in opinion, the *poſtea* was delivered to the plaintiff.

The two laſt caſes were inſurances upon time; but from the principles laid down in them, and in the former caſe of *Stevenſon* v. *Snow*, it ſeems perfectly clear, that when the contract is entire

tire, whether it be for a ſpecified time, *or for a voyage*, there ſhall be no apportionment or return, if the riſk has once commenced. And therefore where the p emium is entire in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the riſk is to end, nor any uſage eſtabliſhed upon ſuch voyages; although there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable.

A rule had been obtained to ſhew cauſe why there ſhould not be a new trial in a caſe, which had come on before Lord *Manſfield* at *Guildhall*, when the jury found a verdict for the defendant. The caſe was this: It was an action on a policy of inſurance, on the *French* ſhip *Le Pactole*, and her cargo, and the voyage was deſcribed in the policy in the following words: "At "and from *Honfleur to the coaſt of Angola, during her ſtay and* "*trade there, at and from thence to her port or ports of diſcharge in* "*St. Domingo, and at and from St. Domingo back to Honfleur.*" The clauſe reſpecting the premium was as follows: "Slaves "valued at 800 *livres Tournois per* head; the ſhip at 1450*l.* "ſterling; other goods, &c. as intereſt may appear; *at a pre-* "*mium of* 11 *per cent.*" The ſhip ſailed to *Angola*, and from thence, after ſtaying ſome time there, to the *Weſt Indies*. On her way to *Angola*, ſhe put in at *Cayenne*, on the coaſt of *America*, and from *Cayenne* went to *Martinico*, confeſſedly out of the way to *St. Domingo*. In this cauſe, the firſt queſtion was a queſtion of fact, not material to our preſent enquiry, viz. Whether the courſe taken was a deviation, or not, from the voyage inſured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counſel for the plaintiff inſiſted, that as there was a count in the declaration for money had and received, the voyage inſured ought to be conſidered as compoſed of three diſtinct parts or voyages; namely, from *Honfleur* to *Angola*; 2dly, from *Angola* to *St. Domingo*; and 3dly, from *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to inſure the riſk from *St. Domingo* to *Honfleur*. Lord *Manſfield* took the opinion of the jury upon that point alſo; and

Berm n v. Woodbridge, Doug. 781.

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they were clear there ought to be no return. Next day, however, his Lordſhip ſaid, he had turned that queſtion in his mind, and that he entertained ſome doubts upon it, and as it was a queſtion of law, deſired Mr. *Lee* to move for a new trial on that ground. It was, however, afterwards moved on both grounds; namely, on the queſtion of fact, whether the deviation was wilful: and 2dly, On the queſtion of law, whether, ſuppoſing it wilful, there ought to be a return of premium.—Theſe queſtions were fully diſcuſſed by three advocates on each ſide; and the Court alſo took time to deliberate upon them: after which the Lord Chief Juſtice delivered the unanimous opinion of the whole court.

Lord *Mansfield*, after ſtating that, upon the queſtion of fact, they were perfectly ſatisfied with the verdict of the jury, proceeded thus: "If, however, the plaintiff ſhould ſucceed on the ſecond point, the determination would virtually allow him a new trial on the whole of the cauſe, becauſe no ſpecial caſe was reſerved. But, on the fulleſt conſideration, and after looking into all the caſes (though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The queſtion depends upon this: Whether the policy contains one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for, by ſplitting the words, and taking "at" and "from" ſeparately, it will make ſix, viz. 1ſt, *At Honfleur*; 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the riſk has never begun, there muſt be a return of premium; and if the voyages, in this caſe, are diſtinct, the riſk from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk has once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exceptions of ſuicide, and the hands of juſtice, if the party commit ſuicide, or is executed in twenty-four hours, there ſhall be no return. The caſe is the ſame if a voyage inſured is once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion: it is eſtimated on the whole at 11*l. per cent.* And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening or not happening, is to put an end to the inſurance. The argument muſt be, that, if the ſhip had been taken

taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable, though she had not been so at *Angola*, &c.; but according to the construction contended for on behalf of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson* v. *Snow* and *Bond* v. *Nutt*, were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson* v. *Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond* v. *Nutt*, it was held, that there were two risks, upon the same principle. "*At Jamaica*" was one; the other, viz. the risk "*from Jamaica*," depended on the contingency of the ship having sailed *on or before the first of August: that* was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie* v. *Fletcher*, and *Lorraine* v. *Thomlinson*, are very strong, for, if you could apportion the premium in any case, it would be in insurances upon time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium." The rule was discharged.

Vide ante, c. 12.

Accordingly in another action for return of premium, tried before Mr. Justice *Willes*, on the northern circuit, where a verdict had been given for the plaintiff, upon a motion to set aside the verdict, and to enter a non-suit, a decision, similar to that of *Bermon* v. *Woodbridge* was made. The insurance was "*At and* "*from Jamaica to Liverpool, warranted to sail on or before the first* "*of August, premium twenty guineas per cent. to return eight, if she* "*sailed with convoy.*" The ship did not sail till *September* and was lost. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into court, which was allowing four for the risk run by the defendant *at Jamaica*.

Mavor v. Gregson, 5 M. East. 24 Geo. III.

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Lord *Mansfield* —" It would be endleſs to go into enquiries about the riſk at *Jamaica*. It appears on the evidence to be different on different ſides of the iſland. Beſides the parties have divided the riſk, with reſpect to convoy; for it is a premium of twenty guineas, to return eight, if ſhe ſail with convoy: but there is an abſolute warranty as to the ſailing, and nothing ſaid of the premium."

Mr. Juſtice *Willes* thought the premium ſhould be apportioned.

Mr. Juſtice *Aſhhurſt* and Mr. Juſtice *Buller* agreed with Lord *Mansfield*, the latter obſerving, that as the parties have not conſidered it as two riſks, nor eſtimated the riſk at *Jamaica*, the court cannot do it for them. In all the inſurances from *Jamaica*, the policy runs " at and from ," and though in many inſtances the voyage has not begun, yet there never was an idea of the premium being returned, and that no uſage was found by the jury. The rule for entering the judgment of nonſuit was made abſolute.

Vide ſupra.

I am aware that the deciſion in this caſe may ſeem to claſh with what fell from Lord *Mansfield*, in delivering his opinion in the caſe of *Tyrie* v. *Fletcher*; in which he put a ſuppoſed caſe of an inſurance " at and from, *provided* the ſhip ſhall ſail on or before the firſt of *Auguſt*." In ſuch a caſe, his Lordſhip obſerved, *as then adviſed*, he ſhould incline to think it a diviſible riſk. In this place, it would be ſufficient to obſerve, in anſwer to ſuch an objection, that the opinion then delivered by Lord *Mansfield* was a mere *obiter dictum* upon a point, ariſing only in the courſe of argument; in which caſe the greateſt abilities are liable to miſtake. But his Lordſhip delivered that opinion, with a wiſe and prudent reſervation, that, *as at preſent adviſed*, he thought ſo and ſo: and it reflects no diſcredit upon any man, however renowned for knowledge, to alter an opinion, upon mature deliberation. There is, however, one very obvious diſtinction, upon which the Court relied much, between *Meyer* v. *Gregſon*, and the caſe put in *Tyrie* v. *Fletcher*: for in the latter, the inſured has uſed a moſt ſignificant word (*provided*) to mark the difference between the two parts of the riſk; *at and from, provided ſhe ſail, &c.*" In the former, the inſured has expreſsly provided for a return

a return of premium, in case the ship sails with convoy; Why did he not use the same precaution, lest she should not sail by the day limited? Having done it in the one case, it is to be presumed he did not mean to do it, or that the insurer would not consent that it should be done, in the other: and as the parties had not divided the risk themselves, the court could not do it for them.

In another case upon an insurance "at and from any port or "ports in *Jamaica* to *London*, following and commencing on "her first arrival there, warranted to sail with convoy from the "place of rendezvous to *Great Britain*," the same questions were again agitated. But as the counsel differed upon the evidence given at the trial, the main question was not fully discussed by the court, but was sent back to a new trial.

Gale v. Machell, B. R. East. 25 Geo. III.

The last case upon this subject was also an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to sail on or before the 1st of *August*, upon goods on board a ship called the *Jamaica*, at a premium of 12 guineas *per cent.*" The ship sailed from *Jamaica* to *London* on the 31st of *July* 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, subject to the opinion of the court upon a case, stating the facts already mentioned. In addition to which, they *expressly* find, that it is "the constant and invariable usage in an insurance, at and from "*Jamaica* to *London*, warranted to depart with convoy, or to "sail on or before the 1st of *August*, when the ship does not "depart with convoy, or sails after the 1st of *August*, to return "the premium, deducting one half *per cent.*"

Long v. Allen, B.R. East Term, 25 Geo. III.

Lord *Mansfield*.—"An insurance being on goods warranted to depart with convoy, the ship sails without convoy; and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has sometimes leaned against them. But where an express usage is found by the jury, the difficulty is cured. They offered to prove the same usage as to the *West Indies*

Vide Meyer v. Gregson.

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Indies in general; but I ſtopt them, and confined the evidence to *Jamaica*."

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, concurred with his Lordſhip.

Mr. Juſtice *Buller*.—" The counſel for the defendant did right in his argument to make the chief queſtion, Whether parol evidence of this uſage ought to have been received? In mercantile caſes from Lord *Holt*'s time, and in policies of inſurance in particular, a great latitude of conſtruction as to uſage has been admitted. By uſage, places come within the policy, which are not expreſſed in words; uſage explains and even controuls the policy. The uſage here found by the jury is univerſal: and though in ſome caſes one half *per cent.* may be a ſmall premium for the riſk *at*; yet the underwriters are aware that it is ſo. In *Meyer* v. *Gregſon*, no uſage was found. Beſides in caſes of this kind, where every thing is left to the whim and caprice of a jury, I lean much againſt them. Here a general and certain uſage is found; and no inconvenience can reſult from it." The *poſtea* was delivered to the plaintiff.

From the tenor of all theſe caſes it ſhould ſeem, as Lord *Mansfield* ſaid in the caſe of *Long* v. *Allen*, that ſo many difficulties occur in apportioning the premium, that the courts are often obliged to decide againſt it, unleſs there be ſome uſage upon the ſubject. Even in the caſe of *Stevenſon* v. *Snow*, the jury found that it had been uſual to divide the riſk; and although the court rejected the uſage for uncertainty, becauſe it did not aſcertain what proportion of the premium ſhould be returned; yet they expreſsly ſay, that it ſerves to ſhew what the idea of the mercantile world is upon the ſubject. If, indeed, we look back to all the caſes reported in this chapter, we never find an apportionment take place, except in *Stevenſon* v. *Snow*, and *Long* v. *Allen*, on account of the difficulty, unleſs there be ſome uſage, as in thoſe caſes, to guide and direct the judgment of the court: and of late years one has known no inſtance of an apportionment occur.

Vide ante, c. 18.

Before this chapter is concluded, it will be proper to obſerve, that in the caſe of *Bond* v. *Nutt*, which was ſo often mentioned in the argument of the caſes upon apportionment, the queſtion

never arose. In that case, the two material questions were, as may be seen by a reference to it in the two preceding chapters of this work, whether the ship had complied with a warranty of sailing by a particular day: and whether in going to the place of rendezvous for convoy, she was guilty of a wilful deviation. It was proper to mention this, to prevent misconstruction; and it was also taken notice of by Mr. Justice *Buller*, in the case of *Long* v. *Allen*.

CHAPTER THE TWENTIETH.

Of the Proceedings upon Policies of Insurance.

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IN the present chapter, it is intended to point out in what manner, and by what form of legal proceeding, a man, who has insured property, and has sustained a loss, is to recover against the underwriters upon the policy. We have formerly seen, that the Court of Policies of Insurance fell into disuse, and the reasons why it did so: since which period all questions of this nature have been decided by the usual mode of trial, known to the laws and constitution of this country, namely, the trial by jury in the courts of common law. Cases of this nature are not the subject of enquiry even in a court of Equity, because the demand is plainly a demand at law; and the loss and damage sustained are as much the object of proof by witnesses, as any other species of damage whatever. This was decided by a decree of Lord Chancellor *King*, whose opinion was afterwards confirmed by the House of Lords.

Vide the Introduction.

In the year 1720, some merchants at *Ostend* set up a trade to the *East Indies*; and amongst others, one *James Maelcamp* equipped a ship, called the *Flandria*, for a voyage to *China*, wherein several persons were concerned. *Maelcamp* had the care and direction of the ship, and gave receipts to the several persons concerned, for the monies they paid, promising to be accountable to them for their respective proportions of the net profit of the voyage. These transactions being carried on mostly at *Ostend* or *Antwerp*, the several persons, who had a mind to be concerned in the undertaking, gave directions to their correspondents at those places, to pay *Maelcamp* what sums they thought fit, and to take his receipts for the same. The Appellants gave directions to one *Conninck* to pay several large sums to *Maelcamp*, on account of the said undertaking; and accordingly *Conninck* paid him divers sums, amounting to 35,000 guilders, and took distinct receipts for the same, according to the proportion

De Gheloff and others v. the Governor and Company of the London Assurance, 3 Brown's Parl. Cases, 505.

tion for which the appellants were concerned therein: he alſo, by the order and direction of the appellants, and for their uſe or benefit, agreed with the reſpondents to inſure on the ſaid ſhip the *Flandria*, 5000*l.* and by a policy, dated the 26th day of *December* 1720, this inſurance was effected, at a premium of 12*l. per cent.*. The ſhip ſailed from *Oſtend*, in order to proceed to *China*; but on her way was ſeized at *Bencoolen*, in the *Eaſt Indies*, by the governor, being an *Engliſh* ſettlement, and the ſhip and cargo were confiſcated. The appellants, upon notice of this event, applied to the reſpondents for payment of the 5000*l.* inſured, and produced to them the ſeveral receipts for their reſpective intereſts in the ſhip, and affidavits affirming the ſeveral ſums therein mentioned, to have been really and *bonâ fide* paid. But the reſpondents refuſing to pay, or make any ſatisfaction to the appellants, *they brought their bill in the Court of Chancery*, againſt the reſpondents, and the ſaid *Conninck*, praying, *that the reſpondents might be decreed to pay the appellants the ſaid ſum of* 5000*l. with intereſt*, according to their ſeveral and reſpective ſhares and proportions thereof. To this bill, the reſpondents put in a demurrer and anſwer, and to ſuch part of the bill, as ſought to compel them to pay the appellants the 5000*l.* or to make them any ſatisfaction for any loſs, which had happened to the ſhip, they demurred; and for cauſe of demurrer ſhewed, that if the policy of inſurance in the bill mentioned was forfeited, *a proper action at law lay to recover the money due thereupon*; and that the appellants, if they were entitled to ſuch relief as they prayed by their bill, might have their complete and adequate remedy by an action at law, where ſuch matters were properly cognizable, and where the appellants ought to prove their intereſt in, and the loſs of the ſhip. The demurrer came on to be argued before Lord Chancellor *King*, when his lordſhip ordered it to ſtand over for two months till *Conninck*'s anſwer ſhould come in; and if the appellants did not procure ſuch anſwer in two months, the demurrer was to be allowed. *Conninck* accordingly put in his anſwer within two months, and thereby admitted, that he made the aſſurance in his own name, in truſt and for the benefit of the appellants; but ſaid *he did not care to permit the appellants to bring any action againſt the reſpondents in his name*; be being adviſed, that if any ſuch action ſhould be brought and they ſhould not prevail therein, he would be perſonally liable to pay all the coſts and charges occaſioned in conſequence thereof. In ſupport

of

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of the demurrer it was urged, that the appellants' demand was plainly a demand at law, as they had nothing to prove but their intereſt, and the loſs of the ſhip, which were facts proper to be tried by a jury. That there was no equity ſuggeſted by the bill, but a pretended difficulty to produce witneſſes: and that their truſtee refuſed to permit them to bring an action in his name: that the former objection might with equal reaſon be ſuggeſted in almoſt every caſe of a policy of inſurance; and the latter appeared manifeſtly to be thrown into the bill, merely to change the juriſdiction, and it was in a great meaſure falſified by the truſtee's anſwer, for he did not ſay that he ever refuſed, but only that *he did not care to permit his name to be made uſe of.* If bills of this kind were encouraged, it would be eaſy to bring all ſorts of property to be tried in a court of Equity.

Upon theſe reaſons, Lord *King* allowed the demurrer; and upon an appeal to the Houſe of Lords, after hearing counſel upon it, it was ordered and adjudged, that the ſame ſhould be diſmiſſed; and the order complained of, affirmed.

There may, it is true, be caſes, where an application to a court of Equity on the part of the inſured, is ſtrictly proper, and will be entertained. For inſtance, if the truſtee in a policy of inſurance do actually refuſe his name to the *ceſtui que truſt* in an action at law, there may be ſome pretence for going into a court of Equity, as Lord *Hardwicke* has once obſerved. Or, if from a concurrence of circumſtances, the perſons, whoſe teſtimony is requiſite to the deciſion of ſome diſputed facts, reſide abroad, the Court of Chancery will grant a commiſſion to examine thoſe witneſſes. But it is not upon a mere general truſt, or the looſe ſuggeſtions of any of theſe facts, that this extraordinary interpoſition will take place.

1 Atk. 547.
2 Atk. 359.

Thereare alſo caſes, in which the inſurers may go into equity, to obtain injunctions to ſtay the proceedings againſt them at law: as in the laſt caſe mentioned, where the evidence of perſons, abroad is requiſite for their defence; in which ſituation, they ſhall have a commiſſion to examine witneſſes abroad, and an injunction to ſtay proceedings at law in the mean time. Another ground for an application to a court of Equity, is a ſuſpicion of fraud on the part of the inſured, and of which I fear the chapter

Chitty v. Selwin and Martin, 2 Atk. 359.

on

on fraud produces too many instances: in such cases the court will compel the party charged to make a full disclosure upon oath of all the circumstances that are within his knowledge; and to deliver up all papers and documents, that are at all material to the question. But except in these instances, all issues upon policies of insurance must be tried in the courts of common law. Even if the parties, by a clause in the policy, agree that in case of a dispute, it shall be referred to arbitration, that will not be a sufficient bar to an action at law; provided no reference has been in fact made, nor is depending.

Vide c. 10.

Thus in an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Kill v. Hollister, 1 Wilf. 129. In Thompson v. Charnock, 8 TermRep. 139. it was held that a covenant in a deed to refer all matters is not sufficient to oust the courts of law and equity of their jurisdiction.

Having thus seen in what courts the party injured in the contract of insurance is to seek for redress, let us now consider, by what form of action that redress is to be obtained. The act of parliament, by which the two Insurance Companies were erected, ordered, that they should have a common seal, by affixing which, all corporate bodies ratify and confirm their contracts. Hence a policy of insurance made by the *Royal Exchange* Assurance Company, or the *London* Assurance Company, is a contract under seal; and if the contract is broken, the proceedings against these Companies must be by action of debt or covenant. From this circumstance a great inconvenience arose; for under the plea of the general issue to an action of debt or covenant, the true merits of the case could seldom come in question: but in order to bring them forward, it became necessary to plead specially. This was attended with such a heavy expence, such great delays, and frequent applications to courts of equity for relief, that the legislature at last interposed, and enacted, "that *in all actions of debt*

6 Geo. I. c. 18.

11 Geo. I. c. 30. s. 43.

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" *debt* to be ſued or commenced againſt either of the ſaid corporations, upon any policies of inſurance under the common " ſeal of ſuch corporations, for the aſſuring of any ſhip or ſhips " goods or merchandizes at ſea, or going to ſea, it ſhould and " might be lawful to and for the ſaid corporations, in ſuch " action or ſuit, to *plead generally, that they owed nothing* to the " plaintiff or plaintiffs in ſuch ſuit or action; and that *in all* " *actions of covenant*, which ſhould be ſued or commenced againſt " either of the ſaid corporations upon any ſuch policy of aſſurance under the common ſeal of ſuch corporation for the aſſuring of any ſhip or ſhips, goods or merchandizes, at ſea or " going to ſea, it ſhould and might be lawful for the ſaid reſpective corporations, in ſuch action or ſuit, to plead generally, " *that they had not broke the covenants*, in ſuch policy contained, " or any of them; and if thereupon iſſue ſhould be joined, it " ſhould and might be lawful for the jury, if they ſhould ſee " cauſe, upon the trial of ſuch iſſue, to find a verdict for the " plaintiff or plaintiffs in ſuch ſuit or action, and to give ſo " much, or ſuch part only of the ſum demanded, if it be an " action of debt, or ſo much in damages, if it be an action of " covenant, as it ſhould appear to them, upon the evidence " given upon ſuch trial, ſuch plaintiff or plaintiffs ought in " juſtice to have."

36 Geo. III. c. 26.

In a ſubſequent act of parliament the following clauſe is inſerted, " that if any action or ſuit ſhall be commenced, brought, " or proſecuted againſt the corporation of the *Royal Exchange* " aſſurance of houſes and goods from fire, by any perſon or " perſons, bodies politick or corporate, for or concerning any " aſſurance or aſſurances by the ſaid recited charter, or hereby " authoriſed to be made, or relating to the powers hereby " granted, or concerning any other matter or thing herein or " in the ſaid charter above recited contained, the ſaid corporation and their ſucceſſors may in ſuch action or ſuit plead the " general iſſue, and give the ſpecial matter in evidence."

The charter recited in the act is that, which enabled the company to make inſurances for lives and againſt fire; and therefore it ſhould ſeem (a ſimilar act having paſſed reſpecting the *London* Aſſurance Company) that in inſurances on lives, and inſurances againſt fire, both theſe companies may plead the general iſſue, as they might by virtue of the ſtatute 11 Geo. 1. in caſes of marine inſurances.

Since

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Since the three firſt editions of this work were publiſhed, an act of parliament paſſed, enabling his majeſty to incorporate, by charter, a company to be called, *The Globe Inſurance Company*, which charter ſhall empower them to make inſurances upon lives; or on houſes, warehouſes, goods, ſhips, veſſels, barges and other craft, with their cargoes, in port, or uſed on navigable canals, farming ſtock, and all other property, againſt loſs or damage by fire, within *Great Britain* or *Ireland*, and any other parts abroad, within his majeſty's dominions or not; and for other purpoſes hereafter to be mentioned in their proper place. I only allude to this new corporation at preſent, for the purpoſe of ſtating, that by the 9th ſection of the act of incorporation above quoted, the ſame pleas, and the ſame power to the jury to aſſeſs the damages which ſhall actually appear to be due, are given, in the caſe of The Globe Inſurance Company, as were given to the *Royal Exchange* and *London* Aſſurance Companies by the acts lately recited. Thus it ſtands with reſpect to the corporations.

39 Geo. III. c. 83. Sect. 2.

Wherever the contract of inſurance is entered into with a private underwriter, it is done by the inſurer merely ſubſcribing his name to the inſtrument, which is no more than what is called by the lawyers a ſimple contract; the remedy for a breach of which is by an action of *aſſumpſit*, or an action upon the caſe founded upon the *promiſe* and undertaking of the inſurer. There are, however, it is to be obſerved, two kinds of actions of *aſſumpſit*: the one, what is denominated a general *indebitatus aſſumpſit*, in which the plaintiff ſtates generally, that the defendant, *being indebted* to him in ſo much money for goods ſold, &c. or for money lent to the defendant, or for money had and received to the uſe of the plaintiff, in conſideration thereof, *undertook and promiſed* to pay the amount; the other is called a *ſpecial aſſumpſit*, which muſt always be founded on ſome particular or ſpecial agreement. The former can never be uſed as the means to recover upon a policy of inſurance. The only caſes, in which it can be at all uſed with reſpect to this contract are, where money has been paid by miſtake to the inſured by the inſurer, upon the ſuppoſition of a loſs, when in fact there was none; a rule which holds, whether the money was paid through the fraud or miſtake of the receiver: or where the inſured wiſhes to recover back the premium which he has paid to the inſurer. In theſe caſes, the proper mode is to bring an action of *indebitatus aſſumpſit* for money

3 Black. Com. 157.

1 Salk. 22. Skinner, 412.

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ney had and received to the plaintiff's uſe: and therefore in almoſt all actions upon policies of inſurance, it is uſual after the count for the ſpecial *aſſumpſit*, to add one or two general counts; that if the policy ſhould be ſet aſide, and the contract declared void, the inſured may at leaſt be enabled to recover the premium.

It being thus evident, that the proper form of action, in order to recover upon a policy of inſurance, is a ſpecial *aſſumpſit*, founded upon the expreſs contract of the perſon who ſigns it; it will follow as an immediate conſequence, that the firſt thing which is neceſſary for the plaintiff to inſert in his declaration, or ſtate of the caſe, will be the policy itſelf, becauſe that is the foundation of the whole. He ſhould alſo ſtate, that it was ſigned by the defendant. The next averment will be, that in conſideration of the premium being paid, the defendant had undertaken to indemnify againſt the loſſes ſpecified in the policy. We ſaw in the firſt chapter of this book, that the premium was the conſideration upon which the whole contract reſted; and that by the cuſtom, the receipt of the premium was acknowledged in the body of the policy. It is then neceſſary for the plaintiff to allege that goods and merchandizes were laden on board to the amount of the ſum inſured, and that the plaintiff was intereſted therein; or if the inſurance be upon the ſhip, the inſured's intereſt muſt, in the ſame manner, be averred (*a*). The next material averment is, that the property inſured was loſt, and by what means that loſs happened; in ſtating which, the plaintiff muſt bring it within one of the perils inſured againſt by the policy: but he muſt always ſtate it according to the truth. Thus he ought to ſhew, that it was by perils of the ſea, by capture, by fire, by detention, by barratry, or any of the other perils mentioned in the policy.

Vide ante, c. 1. p. 33.

Where the loſs had been by *barratry*, the breach was thus aſſigned, the proceedings being at that time in *Latin*, *per frau-*

Knight v. Cambridge, 2 Ld. Raym. 1349. 1 Stra. 581.

(*a*) In *Nantes* v. *Thompſon*, 2 Eaſt's Rep. 385. the Court of King's Bench unanimouſly decided, after time taken to deliberate, and after two arguments at the bar, that a declaration on a policy of inſurance need not aver any intereſt in the aſſured, though there be no ſuch words as "intereſt or no intereſt" in the policy. This caſe has been removed by writ of error into the Exchequer Chamber; but though it has been twice argued, no judgment has as yet been pronounced, 1809.

dem

dem et negligentiam magiſtri navis depreſſa et ſubmerſa fuit, et totaliter perdita et amiſſa fuit, and it was inſiſted, that this was not within the meaning of the word *barratry*, but the breach ſhould have been expreſs, that the ſhip was loſt by the *barratry* of the maſter.

The Court were unanimouſly of opinion, that there was no occaſion to aver the fact in the very words of the policy; but if the fact alleged came within the meaning of the words in the policy, it was ſufficient. Barratry imports fraud, and he that commits fraud, may properly be ſaid to be guilty of a neglect, namely, a breach of duty.

It is true that the practice at preſent, as I have reaſon to believe from precedents which I have ſeen ſettled by the ableſt ſpecial pleaders, is to aver ſuch a loſs to have happened "by the "barratry of the maſter or mariners."

If the plaintiff in his declaration allege, that a total loſs has happened, and lay the damages as for a total loſs, it ſhall be no bar to his recovery, though he can only prove a partial loſs; for in an action for damages merely, a man may always recover *leſs*, but never *more* than the ſum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimouſly over-ruled.

See the ſtatutes juſt quoted as to the corporations, upon this point.

The caſe, in which it was ſo determined, came before the Court upon a queſtion reſerved by Lord *Mansfield* at *Niſi Prius* at *Guildhall*, upon an action on the caſe, on a policy of inſurance. The inſurance was made upon one-fourth part of the ſhip *Encouragement*, and of its cargo, from *Greenland* to *London*, free from average under a certain value, from the ice. The plaintiff *declared upon a total loſs of the ſhip*; the declaration expreſsly ſtated a *total loſs* of it; and the *damages* were laid for a *total loſs*. But the evidence only proved an *average or partial loſs*; it was not attempted to prove a total one; and it was only ſhewn that the ſhip had received *ſome* damage, which little more than 50*l.* would have repaired. The defendant's counſel objected at the trial, "that this evidence did not ſupport the plaintiff's declaration." They alſo repreſented the practice to have been on their ſide; namely, that proof of a partial loſs was not ſufficient

Gardiner v. Croſdaile, 2 Burr. 904. 1 Blac. Rep. 198.

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to maintain a declaration for a total loſs. A verdict was taken for 20*l.* as for an average loſs: but it was agreed on both ſides that the verdict ſhould be ſubject to the opinion of the Court, "Whether it was maintainable in point of law." If the Court ſhould be of opinion that it was, the verdict was to ſtand; but if the Court ſhould be of a contrary opinion, the plaintiff was to have a judgment of nonſuit againſt him.

Lord *Mansfield*.—"At the trial it appeared to me, and ſo the jury thought, that the preſent caſe could *not* be conſidered as a *total* loſs. The defendant's counſel objected, as they do now, that the jury could not take a partial loſs into their conſideration, upon an expreſs declaration for a total loſs: and I underſtood from them, that the practice ſupported their objection. Mr. *Norton*, who was counſel for the plaintiff at the trial, then argued to the contrary upon principles: and he alſo cited the caſe of *Walker* v. the *Royal Exchange Aſſurance Company*. But that caſe does not prove much; for that was a total loſs. I was ſatisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I choſe to put it in ſuch a ſhape, that the opinion of the Court might be had without delay or expence. No hardſhip was done to the defendant upon the *quantum* of the damages found: for the plaintiff took a great deal *leſs* than it clearly appeared on the evidence that the loſs amounted to. I cannot hear of any ſuch determination as can ſupport the objection that has been made by the defendant's counſel. Therefore it ſtands ſingly upon principles. And upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages for a *partial* loſs. This is an action upon the caſe, which is a liberal action; and a plaintiff may recover *leſs* than the grounds of his declaration ſupport, though *not more*. This is agreeable to juſtice, and conſiſtent with his demand. Here are two grounds of the plaintiff's declaration; namely, the policy, and the damage to the ſhip. As to its being a total or a partial loſs, that is a queſtion more applicable to the *quantum* of the damages, than to the ground of the action. The ground of the action is the ſame, whether the loſs be partial or total; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loſs: this indeed would be an objection if it were true. But the defendant does in truth come prepared to ſhew, that either no damages had happened

happened at all; or at leaſt, that damages have not happened to ſuch a degree as the plaintiff has alleged in his declaration; or, that he did not ſign the policy. As to the effects of a judgment by default, the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of enquiry, any greater damages than he could prove to the jury ſworn to aſſeſs them, that he had actually ſuffered. If the preſent objection were to prevail, it would introduce the addition of unneceſſary counts in declarations, and an enormous ſwelling of the records of the court. It is more convenient to lay the caſe ſhort, than prolix. There is no proof of any practice contrary to the principles. It was the apprehenſion of ſuch contrary practice, that was the only occaſion of my having any doubt at the trial. I am now fully ſatisfied, that the plaintiff may recover either the *whole* or *leſs* than he has laid; and therefore this verdict ought, in my opinion, to ſtand. In an ejectment for more, the plaintiff may recover leſs: it is every day's practice."

Mr. Juſtice *Deniſon* concurred, and thought it a very plain caſe. It is an action for *damages* for the loſs of the ſhip. Now, in an action for damages, the plaintiff is to recover his damages according to his proof, *pro tanto*; but he is not, in an action for damages, obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a houſe, would not the plaintiff be entitled to recover damages for pulling down *half* the houſe, provided he had proved that the defendant did it? This is no variance of the evidence from the declaration; the evidence tends, in a certain degree, to the proof of what is alleged in the declaration; it is not neceſſary to lay two counts in ſuch a declaration as this.

Mr. Juſtice *Foſter* was of the ſame opinion.

Mr. Juſtice *Wilmot*.—"In actions for damages, the plaintiff may recover all, or for any part: the damages are ſeverable, and may be given PRO TANTO. Here damages are laid for a *total* loſs, which is only the meaſure of the damages: and the plaintiff proves a *partial* loſs; which only affects the meaſure of the damages, but is no variance from the allegations contained in the declaration. If this had been a judgment by default, yet the

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plaintiff could not, even in that caſe, have recovered damages for *any more* loſs than he was able to prove under the writ of enquiry of damages. And as to the defendant's not having ſufficient notice that he ſhould come prepared to defend againſt a partial loſs, I think he had ſufficient notice to come thus prepared: for he ought to come prepared to prove, "that no damage at all happened." If *any* at all happened, he will be liable *pro tanto*, if it be proved."

The *poſtea* was deliveded to the plaintiff.

Page v. Fry. 2 Boſ. & Pul. 240.

In a declaration on a policy, the plaintiff, who was an agent, averred in his declaration, that Meſſ. *Hyde* and *Hobbs* were at the time of loading, at the time of ſubſcribing the policy, and until the time of the loſs, intereſted in the commodity inſured to a large amount, viz. to the amount of all the money ever inſured thereon; and that the policy was made for their uſe, riſk, and benefit. It appeared in evidence that, *prior to the policy*, *Hyde* and *Hobbs* had permitted another mercantile houſe to take a joint concern in the corn: and it was objected that the fact ſo proved was in direct contradiction to the averment in the declaration.

But Lord *Eldon*, *Heath*, *Rooke* and *Chambre*, Juſtices, were of opinion, that there was a ſufficient intereſt throughout the entirety of this cargo, notwithſtanding other perſons had a beneficial intereſt in a part, to ſupport the averment in the declaration; and that the ſpirit of the act of the 19 *Geo.* 2. only requires that the policy ſhall not be a gaming policy (*a*).

An attempt was alſo once made to nonſuit a plaintiff, becauſe the declaration alleged that he had a ſmaller intereſt than he appeared in proof to have. But this attempt alſo failed.

Page v. Rogers, Sitt. at Guildhall, Hil. Vac. 1785.

It was an action on a policy of inſurance, in which the declaration ſtated, that the plaintiff was poſſeſſed of one third of the

(*a*) Since this deciſion, and ſince the former edition, I have found a MS. caſe of Hiſcox v. Barrett, at Guildhall, December 1747, in which Lord Chief Juſtice *Lee* held accordingly. MSS. *penes me*. And ſee alſo Perchard v. Whitmore, 2 Boſ. & Pull. 155, note. Where *Buller* Juſtice held, that if *A.* and *B.* declare upon a policy, and aver the intereſt in themſelves, it is not a fatal variance, though it ſhall appear that *C.* became intereſted after the policy effected, and before the action was brought.

ſhip on which the inſurance was made. It was proved that the plaintiff had purchaſed the whole ſhip at one period; and as there was no evidence to ſhew that he had ſince parted with any ſhare of it, the counſel for the defendant inſiſted, that the plaintiff had not proved his declaration, which alleged him to have but one third.

Lord *Mansfield* over-ruled the objection, ſaying, that this was *primâ facie* ſufficient evidence; for *omne majus continet in ſe minus* (*a*).

We have ſeen that policies of inſurance are ſeldom effected by the party himſelf really intereſted, but generally by the intervention of a broker employed by the inſured, who tranſacts the buſineſs with the underwriters as attorney for his principal, from whom he receives his inſtructions, and from which, if he deviate, he is anſwerable to his employer in an action on the caſe; like any other perſon who undertakes any office, employment, truſt, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and ſkill (*b*). It is alſo common for the broker to open the policy in his own name, at the ſame time declaring for whoſe uſe, benefit, or intereſt, the ſame is made; how far ſuch declaration is neceſſary we have formerly explained. As the policy may be made in the name of the broker, ſo alſo may the action be brought in his name, as was done in the caſe

3 Black. Com. 168.

25 Geo. III. c. 44. Vide ante, c. 1. p. 18. and ſee alſo 28 Geo. III. c. 56. ante, p. 19.

1 Burr. 490. Vide ante, c. 15.

(*a*) But if the plaintiff in this caſe had the whole ſhip, it ſeems that he could never bring another action for the other two thirds; becauſe that would be a ſplitting of actions.

(*b*) As the brokers tranſact the chief part of the buſineſs, and generally pay the premiums, the law has given them a lien upon the policies in their hands, ſo as to enable them to deduct out of any monies they may receive for the aſſured, not only the premium and commiſſion due on the particular policies, but the general balance due to them on the account between them and their principals. And it has alſo been decided, that if a broker ſhould part with the poſſeſſion of the policy, ſo as to loſe his lien upon, it; yet if it get back into his hands for any purpoſe whatever, the lien revives. Theſe points were ſettled in the caſe of *Whitehead* v. *Vaughan*, Trin. 25 *Geo.* 3. in B. R. and of *Parker* and others v. *Carter*, in C. P. Trinity 1788: both of which caſes are ſtated at length in Mr. *Cooke*'s book on the Bankrupt Laws, 4th edit. p. 579. But if the policy was effected by an agent in his *own* name, he being an *Engliſhman*, telling the broker, that the property was *neutral*, and to *warrant* it to be ſo, this was held to be a ſufficient notification to the broker that the party acted only as *agent*, and therefore in an action by the foreign principal againſt the broker, he can only ſet off the money due for the particular premium, and not the general balance due from the *Engliſh* agent to him. *Mauns* v. *Henderſon*, 1 *Eaſt*'s R. 335.

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of *Godin* and the *Royal Exchange Aſſurance Company*, and a variety of other caſes.

As this contract depends ſo much upon the pureſt good faith, and the moſt liberal communication of circumſtances, relative to each particular caſe; when gaming inſurances, without intereſt, were aboliſhed by the legiſlature, in order effectually to anſwer the purpoſe intended, it became neceſſary to order that a diſcloſure of all inſurances, effected on the ſame property, ſhould be made even after an action brought.

19 Geo. II. c. 37. ſ. 6. Thus it was declared, "That in all actions or ſuits brought "or commenced by the aſſured, upon any policy of aſſurance, "the plaintiff in ſuch action, or ſuit, or his attorney or agent, "ſhould, within fifteen days after he or they ſhould be required "ſo to do in writing by the defendant, or his attorney or agent, "declare what ſum or ſums he had aſſured, or cauſed to be aſ-"ſured in the whole, and what ſums he had borrowed at re-"ſpondentia or bottomry, for the voyage in queſtion in ſuch ſuit "or action."

In addition to this very wiſe proviſion, it having appeared to the legiſlature, that ſome vexatious perſons, notwithſtanding the perfect willingneſs of the inſurers to pay loſſes, to which they were liable, ſtill perſevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into court; it was therefore enacted

19 Geo. II. c. 37. ſ. 7. "That it ſhould and might be lawful for any perſon or perſons, "body or bodies corporate, ſued in any action or actions of "debt, covenant, or any other action or actions, on any policy "or policies of inſurance, *to bring into court any ſum or ſums of "money*; and that if any ſuch plaintiff or plaintiffs ſhould refuſe "to accept ſuch ſum or ſums of money ſo brought into court as "aforeſaid, with coſts to be taxed, in full diſcharge of ſuch "action or actions, and ſhould afterwards proceed to trial in "ſuch action or actions; and the jury ſhould not aſſeſs damages "to ſuch plaintiff or plaintiffs, exceeding the ſum or ſums of "money ſo brought into court, ſuch plaintiff or plaintiffs, in "every ſuch caſe and caſes ſhould pay to ſuch defendant or de-"fendants, in every ſuch action or actions, coſts to be taxed; "any law, cuſtom, or uſage, to the contrary notwithſtanding."

Theſe

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Vide ſupra.

Theſe preliminary ſteps being taken, the defendant is to put in his plea to the charge or declaration of the plaintiff; which, by the act of parliament, is preſcribed to the Aſſurance Companies, when they are defendants; namely, that they owe nothing, if the action be debt: or if it be covenant, that they have not broken the covenants, which they had undertaken to keep. But in the caſe of a private inſurer, as the action is merely an *aſſumpſit*; ſo the anſwer to it is *non aſſumpſit*; that is, the defendant has not promiſed as the plaintiff has alleged. Under this plea, the defendant will have a right to take advantage of all thoſe circumſtances, which, as we have ſeen, will either render the policy void, or make it of no effect: ſuch as fraud, want of intereſt, not being ſea-worthy, deviation, non-performance of warranties, and all other grounds ſtated in former chapters.

Iſſue being thus joined between the parties, the next object for our conſideration is the proof, which it will be neceſſary for the plaintiff to produce, in order to ſupport his caſe. This enquiry will be rendered very eaſy, by reflecting upon thoſe allegations, which, as we have before ſhown, it is incumbent upon the plaintiff to inſert in his declaration. We have ſeen, that the policy muſt be ſet out in the declaration; and conſequently the firſt evidence to be given, is, that the defendant's hand-writing is ſubſcribed to the policy (*a*). This, in the liberality of modern practice, is ſeldom required to be done; as the ſubſcription is uſually admitted; but in ſtrictneſs, it may be inſiſted on: and in a work of this nature, it is my buſineſs to point out every thing, which

(*a*) It is now frequently the practice to ſubſcribe policies by an agent of the underwriter; and therefore where that is the caſe, in ſtrictneſs, the authority of the agent ought to be proved. This in fact is *ſeldom* inſiſted upon, the parties in general, when they defend a cauſe of this nature, intending to try ſome real or ſuppoſed queſtion, either of law or fact. But experience in Courts of Juſtice informs us that ſuch defences are ſometimes made. So a few years ago an action was brought upon a policy, in which the policy was ſubſcribed by one *Hutchins*, for the defendant. The witneſs ſaid he did not know by what authority, but that *Hutchins* was in the conſtant habit of ſubſcribing policies for the defendant, and had done ſeveral for the witneſs, and for others, to his knowledge. It was objected that *Hutchins* might have done this by ſome limited power of attorney; which ought therefore to be produced. But Lord *Kenyon* overruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authorized, and his having ſubſcribed ſeveral policies was ſufficient to charge the defendant, who, and not the plaintiff, ought to prove his authority, to be limited. *Neale* v. *Erving*, 1 *Eſp.* R. 61.

either

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either party is expected, or compellable to perform. When the ſignature is once proved, the Court and jury are in poſſeſſion of the extent of the contract (except as it may be further extended by *uſage*), the conditions to be performed on either ſide; and all the other circumſtances relative to the riſk inſured. And although in the courſe of our enquiries, we have ſeen frequent inſtances where the uſage and practice of a particular trade controul and extend the written words of a policy; yet in no caſe ſhall evidence of any agreement be allowed, which directly tends to contradict the policy; for to ſuffer them to be defeated by agreements by parol, not appearing, would be greatly to diminiſh their credit, and to render them of no value.

Vide ante, 2.

Kaines v. Knightly, Skinner, 54.

Thus in an action upon a policy of inſurance "*from Archangel to Leghorn*," the defendant ſaid, that the agreement before the ſubſcription was, that the adventure ſhould begin, *but from the Downs*; but this agreement was not put into writing. Lord Chief Juſtice *Pemberton* ſaid, that policies were ſacred things; and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he that ſubſcribes a bill of exchange, payable at ſuch a day, ſhall be allowed to go from it, and ſay, it was agreed to be on a condition, when it may be that the bill had been negotiated: for though neither of them are ſpecialties, yet they are of great credit, and much for the ſupport, conveniency, and advantage of trade. The jury, notwithſtanding this direction, found for the defendant: but afterwards there was a trial at bar, and a verdict was given for the plaintiff, according to the opinion of the Court.

The policy not only proves the extent and nature of the contract; but it alſo eſtabliſhes another allegation in the plaintiff's declaration, namely, *that the premium was paid*: for it was formerly ſhewn, that every policy contains the following clauſe: "*confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured, at and after the rate of per cent.*"

Vide c. 1.

The plaintiff having averred in his declaration, that he is *intereſted* to the amount of the property inſured, it is abſolutely neceſſary that this allegation ſhould be proved. This he muſt do by a production of all the uſual documents, ſuch as *the bills of ſale*, bills of parcels, and the coſts of the outfit; *the bills of lading*

lading (*a*), signed by the master, specifying the goods received on board, and for whom he is to carry them, custom-house clearances, and every other paper, which may be thought necessary to substantiate his right to the property (*b*). So if the assured has exercised acts of ownership, in directing the loading, &c. of the ship; and paying the people employed, this has been held to be *primâ facie* sufficient proof of ownership in the vessel (*c*).

The agent or broker of the assured having shewn to the underwriter the protest of the captain, stating the circumstances of the

Senat v. Porter, 7 Term Rep. 158.

(*a*) In addition to the bill of lading, &c. it is usual to call the captain or some other person to prove that the goods mentioned in it were actually on board. The first great cause, in which the law relative to bills of lading came much under discussion, was in a modern case of *Caldwell* and others v. *Ball*, reported very much at length, and with great accuracy in 1st Term Reports, p. 205. That case was fully argued at the bar, and very much debated on the bench. Amongst other things the court held, that a bill of lading is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading: that it is assignable in its nature; and by indorsement the property is vested in the assignee. That where several bills of lading of the same date, but of different imports, have been signed, no reference is to be had to time, when they were first signed by the captain: but the person, who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the indorser, after such indorsement, is good.

M'Andrew v. Bell, 1 Esp. Rep. 373.

Hibbert v. Carter, 1 Term Rep. 745.

(*b*) Two partners purchased a ship under a regular bill of sale, conformable to the 26 Geo. 3. ch. 60. (Lord *Hawkesbury*'s act.) They afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the direction of the statute: and it was held that the four partners had not an insurable interest in *the freight*; for as the right of freight results from the right of ownership, these four partners had not shewn in themselves *jointly* (as laid in the declaration) either a legal or equitable title to the ship. *Camden* and others v. *Anderson*, 5 Term Rep. 709. and *Marsh* v. *Robinson*, 4 Esp. Rep. 98. Acc.

(*c*) *Amery* v. *Rodgers*, 1 Esp. Rep. 207. and frequently since in many cases, particularly in *Robertson* v. *French*, (4 East's Rep. 130.) which, upon other points, was much discussed. (See ante, p. 60.) But the whole Court held, Lord *Ellenborough* delivering the judgment, that the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the Register Acts. And it was also held that such parol evidence of ownership, arising from possession at a *particular period*, was not disproved by producing a *prior* register in the name of another, and a *subsequent* register to the same person upon a sale under a decree of the Vice-Admiralty Court, those being perfectly consistent with a title in other persons *in the mean time*, agreeable to the averment in the declaration.

loss

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loſs of the ſhip inſured, and demanding payment, it was held by the Court, on a motion for a new trial, that the delivery of this paper to the defendant did not entitle him to read it, as evidence of the facts contained in it; though had the captain been called to give a different account of the loſs from that contained in the proteſt, it might have been produced to ſhew that *he* was not worthy of credit: but it could not be read on the part of the defendant to prove any fact in the caſe.

The ſame doctrine had been previouſly held by Lord Kenyon in Chriſtian v. Combe, 2 Eſp. R. 489.

Wright v. Barnard, Sitt. after Mich. 1798, at Guildhall.

So alſo in an action on a policy on the ſhip, a condemnation of the veſſel by a Court of Vice-Admiralty abroad for inſufficiency, after a ſurvey had upon oath, was offered in evidence by the underwriters, to prove that there were defects in the ſhip, from which, want of ſea-worthineſs at a prior time was meant to be inferred; but Lord *Kenyon* rejected the ſentence, as *evidence of the facts contained in it;* though he admitted it to be read to prove the mere fact of a condemnation having taken place: and this, notwithſtanding an order of the Court of Exchequer, directing that it ſhould be admitted in evidence.

Ruſſel v. Boheme, 2 Stra. 1127.

A man having purchaſed goods beyond ſea, in order to prove his property in the cargo, in an action upon a policy of inſurance, produced a *bill of parcels* of one *Gardiner* at *Peterſburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence againſt the inſurers; but the Lord Chief Juſtice allowed it.

Sir William Lee.

Smith v. Lafcelles, 2 Term Rep. 187.

Before the ſubject of intereſt is entirely cloſed, I will take the opportunity of mentioning, what I omitted in a former chapter, that if a merchant abroad, who is intereſted in goods and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by a letter, incloſing the bills of lading, direct an inſurance, the mortgagor has ſtill an inſurable intereſt, although the mortgage was become abſolute, before the letter directing the inſurance was received: and therefore an action was held to lie againſt the agent for not inſuring agreeably to the inſtructions contained in ſuch letter.

It is, in the laſt place, incumbent on the plaintiff to prove that a loſs has happened, and that, by the very means, ſtated in the declaration. It is abſolutely neceſſary, that this rule ſhould be

be ſtrictly adhered to; for otherwiſe the inſurers would come into court prepared to defend themſelves againſt one charge, and one ſpecies of loſs; and they would then be obliged to reſiſt a demand upon a quite different ground. This appeared clearly in a modern caſe. CHAP. XX.

It was an action on a policy of inſurance, which came on to be tried before Mr. Juſtice *Buller*, who nonſuited the plaintiff. Upon a motion to ſet aſide that nonſuit, the following report was made by the learned judge. The inſurance was *upon goods* on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, warranted a *Daniſh* ſhip; and on the policy was this memorandum: "The following inſurance is declared to be on money "expended for reclaiming the ſhip and cargo valued at the ſum, "which ſhall be declared hereafter. The loſs to be paid, *in "caſe the ſhip does not arrive at Marſeilles*, and without further "proof of intereſt than this policy; warranted free from all "average, and without the benefit of ſalvage." It appeared that the plaintiffs were proprietors of the *cargo* but not of the *ſhip*. That the ſhip originally ſailed with the cargo on board from *Riga* to *Marſeilles*, and that an inſurance had been effected at *Bremen* upon the cargo for that voyage; in the courſe of which ſhe was taken, and brought into *Falmouth*, by an *Engliſh* privateer. That a ſentence of condemnation had been there obtained, which was afterwards reverſed upon the prize having been proved to be a neutral ſhip, but the expences of procuring that reverſal were ordered by the Admiralty Court to be *a charge upon the cargo*. The plaintiff's agents accordingly paid the ſum of 1,031*l.* 14*s.* for the expences of reclaiming the ſhip and cargo; and immediately procured the policy in queſtion to be effected in *January* 1781, according to the purport of the memorandum. In the *February* following, the ſhip ſet ſail from *Falmouth* with the original cargo on board, in the proſecution of her voyage to *Marſeilles*; but on the 26th of the ſame month, *before her arrival there*, was captured by a *Spaniſh* ſhip, and carried into *Ceuta* in *Spain*, where ſhe was again condemned. An appeal was brought in the ſuperior court of *Madrid*, which promiſing to be of long continuance, the cargo, which was of a periſhable nature, was ordered to be ſold, and the proceeds to be brought into court, to wait the event of the ſuit. In *May* 1783, the veſſel was reſtored by ſentence of the court, and the ſurplus of the proceeds, which

Kulen Kemp v. Vigne, 1 Term Rep. 304.

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which arose from the sale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix dollars. As soon as the ship was liberated she sailed from *Ceuta* to *Malaga*, in order to refit, and having there made the necessary repairs, set sail for *Bremen*, and in that voyage was lost. The insurance made upon the cargo at *Bremen* has been paid. The declaration averred, that "*whilst the ship was proceeding in her said voyage from Falmouth to Marseilles, and before she could arrive at Marseilles, she was captured by the Spaniards, and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs.*" At the trial it was objected on the part of the defendant, 1st, That this was not an insurable interest; and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring, for they stated the loss to have happened *by capture*; whereas, though the vessel was captured, yet, having been afterwards restored, she might have reached her destined port, notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum. I was of that opinion, and upon the last ground I nonsuited the plaintiffs.

This case was very fully argued both upon the merits, and the formal objection, after which all the Judges spoke upon the question.

Lord *Mansfield*.—"A loss accrued upon the cargo in the voyage: the underwriter is sued and the loss is averred in the declaration to be *by capture*. The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue the voyage, and was afterwards lost in another voyage."

Mr. Justice *Willes*.—"Upon this case it is clear, that the plaintiffs cannot recover. In the first place, there was certainly a deviation, for the ship set sail for *Malaga* instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss *by capture*: but after the capture, the policy might still have been complied with by the ship's going to *Marseilles*; and therefore the loss cannot be said to have happened by that circumstance."

Mr.

Mr. Juſtice *Aſhhurſt* and Mr. Juſtice *Buller* alſo delivered their opinions, agreeing with Lord *Mansfield* and Mr. Juſtice *Willes* upon the formal objection; and both went much at large into the merits, upon which I forbear to follow them or the Chief Juſtice, as what paſſed upon that ſubject is not material to our preſent enquiry.

But where a loſs is averred to be by perils of the ſea, and ſome of the goods inſured are ſpoiled, and others ſaved, it is allowable to give the expence of the ſalvage in evidence upon ſuch an averment, becauſe it is a conſequence of the accident laid in the declaration.

In an action on a policy of inſurance, for inſuring goods on board the ſhip *A.* the plaintiff declares that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. The evidence was, that many of the goods were ſpoiled, but ſome were ſaved; and the queſtion was, Whether the plaintiff might give in evidence the expence of ſalvage, that not being particularly laid as a breach of the policy in the declaration?

Cary v. King, Caſ. temp. Hard. B. R. 304.

Lord *Hardwicke* Chief Juſt.—"I think they may give it in evidence; for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river; it goes on and ſays, that by reaſon thereof the goods were ſpoiled, that is the only ſpecial damage laid: yet it is but the common caſe of a declaration that lays ſpecial damage, where the plaintiff may give evidence of any damage that is within his cauſe of action as laid. And though it was objected, that ſuch a breach of the policy ſhould be laid, as the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt neceſſarily follow, that ſome damage did happen."

CHAPTER THE TWENTY-FIRST.

Of Bottomry and Reſpondentia.

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THE contract of bottomry is in the nature of a mortgage of a ſhip, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip, as a ſecurity for the repayment; and it is underſtood, that if the ſhip be loſt, the lender alſo loſes his whole money; but if it return in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt ſtipulated to be paid, however it may exceed the uſual or legal rate of intereſt. When the ſhip and tackle are brought home, they are liable, as well as the perſon of the borrower, for the money lent.—But when the loan is not made upon the veſſel, but upon the goods and merchandizes laden thereon, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, then the borrower only is *perſonally* bound to anſwer the contract; who therefore in this caſe is ſaid to take up money *at reſpondentia*. In this conſiſts the difference between *bottomry* and *reſpondentia*; that the one is a loan upon the ſhip, the other upon the goods: in the former the ſhip and tackle are liable, as well as the perſon of the borrower: in the latter, for the moſt part, recourſe muſt be had to the perſon only of the borrower. Another obſervation is, that in a loan upon bottomry, the lender runs no riſk, though the goods ſhould be loſt; and upon reſpondentia, the lender muſt be paid his principal and intereſt, though the ſhip periſh, provided the goods are ſafe. But in all other reſpects, the contract of bottomry and that of reſpondentia are upon the ſame footing; the rules and deciſions applicable to one, are applicable to both; and therefore, in the courſe of our enquiries, they ſhall be treated as one and the ſame thing, it being ſufficient to have once marked the diſtinction between them.

2 Blackſt. Com. 457.

2 Blackſt. Com. 458.

2 Valin Com p 4.

2 Blackſt. Com. 458. 1 Siderfin. 27.

Theſe terms are alſo applied to another ſpecies of contract, which does not exactly fall within the deſcription of either; namely, to a contract for the repayment of money, not upon the ſhip and goods only, but upon the mere hazard of the voy-

age itself; as if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed: which agreement is sometimes called *fœnus nauticum* or *usura maritima*. But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "that all sums of money lent on bottomry, or at "respondentia, upon any ship or ships belonging to his Majes- "ty's subjects, *bound to or from the East Indies*, should be lent "only on the ship, or on the merchandize or effects, laden or "to be laden, on board of such ship, and should be so expressed "in the condition of the said bond; and the benefit of salvage "should be allowed to the lender, his agents or assigns, who "alone shall have a right to make assurance on the money so "lent; and no borrower of money on bottomry, or at respon- "dentia, shall recover more on any insurance than the value of "his interest in the ship, or in the merchandizes and effects "laden on board thereof, exclusive of the money so borrowed; "and in case it should appear that the value of his share in the "ship or in the merchandizes or effects laden on board of such "ship, did not amount to the full sum or sums he had borrowed "as aforesaid, such borrower should be responsible to the lender "for so much of the money borrowed, as he had not laid out "on the ship or merchandizes laden thereon, with lawful inte- "rest for the same, in the proportion the money not laid out "should bear to the whole money lent, notwithstanding the "ship and merchandizes should be totally lost."

Molloy, lib. 2. c. 11. s. 8.

19 Geo. II. c. 37. s. 5.

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the Common Law, except in the following instance, which is another statute prohibition. The statute alluded to declares, that all contracts made or entered into by any of his Majesty's subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry, or any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies or parts aforesaid*, shall be null and void.

7 Geo. I. c. 21. s. 2.

This

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This act, it ſhould ſeem, does not mean to prevent the king's ſubjects from lending money on bottomry on foreign ſhips trading from their own country to their ſettlements in the *Eaſt Indies*. The purpoſe of the ſtatute was only to prevent the people of this country from trading to the *Britiſh* ſettlements in *India* under foreign commiſſions, and to encourage the lawful trade thereto.

It lately became a queſtion in the Court of Common Pleas, whether an *American* ſhip, ſince the declaration of *American* independence, was *a foreign* ſhip, within the ſtatute of the 7 *Geo.* 1. *ch.* 21. *ſ.* 2. It came before the court, upon a motion to diſcharge the defendant out of cuſtody upon entering a common appearance. The defendant was held to bail upon a reſpondentia bond, which was executed by the defendant, who was an *American*, to ſecure the payment of a cargo ſhipped by the plaintiff on board an *American* ſhip in the *Eaſt Indies*, homeward bound from *Calcutta* to *Rhode-Iſland* in *America*. The ſhip had ſailed from *England*, and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.

Sumner v. Green, 1 H. Blackſt. 301.

The Court were much inclined to think the bond was void, the caſe being within the miſchief deſigned to be remedied by the act. But as the queſtion was of conſiderable conſequence, they thought it not proper to be diſcuſſed on this ſummary application: but they ordered the defendant to be diſcharged on the ground, that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in priſon: more particularly as the plaintiff would by ſuch means have an opportunity of tampering with the defendant in priſon, and of eſcaping from the penalties of the act, by preventing the caſe from being brought before the court.

A loan upon the voyage, without a ſecurity on the ſhip or goods, is entirely prohibited by the laws of *France*; for in the marine ordinances of that country, there is a *general* regulation ſimilar to that made here with reſpect to *India* ſhips; "Faiſons "défenſes de prendre deniers a la groſſe ſur le corps et quille du "navire, ou ſur les marchandiſes de ſon chargement, *au dela* "*de*

Ord. of Lou. 14. tit. des Contrats à groſſe Avant. art. 3.

"de leur valuèr, au peine d'etre contraint, *en cas de fraude*, au "paiement des ſommes entieres, non obſtant la perte ou priſe "du vaiſſeau." And in another place it is ſaid, that where a greater ſum is borrowed than the ſhip or goods are worth, where there is no fraud, the contract is void, except as to the amount of the real value of the ſhip or goods. If then the contract be only binding as far as there is property to anſwer the loan, it follows that, by the laws of *France*, this contract cannot exiſt upon the hazard of the voyage merely, unleſs there be a ſecurity alſo upon the ſhip or goods.

Loc. cit. art. 15.

The contract of bottomry and reſpondentia ſeems to deduce its origin from the cuſtom of permitting the maſter of a ſhip, when in a foreign country, to hypothecate the ſhip in order to raiſe money to refit. Such a permiſſion is abſolutely neceſſary, and is impliedly given him in the very act of conſtituting him maſter, not indeed by the Common Law, but by the Marine Law, which in this reſpect is reaſonable; for if a ſhip happen to be at ſea, and ſpring a leak, or the voyage is likely to be defeated for want of neceſſaries, it is better that the maſter ſhould have it in his power to pledge the ſhip and goods (*a*) or either of them, than that the ſhip ſhould be loſt, or the voyage defeated. But he cannot do either for any debt of his own: but merely in caſes of neceſſity, and for completing the voyage. Although

2 Blackſt. Com. 457.

Barnard v. Bridgman, Moor, 918. fully reported in Hobart, p. 11.

Molloy, b. 2. c. 2. ſ. 14. Leg. Oler. art. 1 & 22.

(*a*) That the maſter might hypothecate the goods, as well as the ſhip, in caſes of neceſſity, depended till lately more upon a general underſtanding that ſuch hypothecation might be made, than upon any very direct authority upon the point. In a note to a caſe in Salkeld, it is ſaid that the maſter may hypothecate either ſhip or goods; for the maſter is entruſted with both, and repreſents the traders, as well as the owners of the ſhip.

Juſtin v. Ballam, 1 Salk. 34.

But in a late caſe in the High Court of Admiralty in *England*, this queſtion has undergone all that elaborate and learned diſcuſſion which the abilities of the advocates of that court were ſo competent to afford it; and has met with a deciſion, *confirming the above note of Juſtin* v. *Ballam*, formed upon mature deliberation and ſolid argument, as will appear from the judgment pronounced by the eminent perſon who preſides in that court. It was my intention to have given an abſtract of the judgment: but an abridgment would have done great injuſtice to the argument of that learned judge; and therefore I content myſelf with having referred to the ſubject as ſo ſettled, and having pointed out to the reader the valuable reports in which the arguments both of the judge and advocates may be found at large. The extent of that deciſion ſeems to be this, that the maſter of a veſſel, carrying a cargo on freight, may, in a foreign port, hypothecate that cargo for the repairing damages ſuſtained by the ſhip at ſea; ſuch repairs being abſolutely neceſſary for the purpoſe of delivering the cargo, according to the charter party.

The ſhip Gratitudine, 3d vol. of Robinſon's Admiralty Rep. p. 240.

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the master of the vessel has this power while abroad, because it is absolutely necessary for purposes of commerce and navigation; yet the very same authority which gave that power in those cases, has denied it when he happens to be in the same place where the owners reside. Thus the laws of *Oleron*, in the place above cited, speak of the captain being in a foreign country, and first writing home to his owners for money, before he takes money on bottomry: and the laws of the *Hanse Towns*, which were founded on those of *Oleron*, speak the same language; for they say, "a master being in *a strange country*, if necessity drive him "to it, may take up money on bottomry, if he cannot get it "without, and the owners shall bear the charge." In addition to this, from all the cases, which have been determined at the Common Law upon the subject, it may be inferred that the ship should be abroad, as well as in a state of necessity, to justify the captain or master in taking money on bottomry. *Molloy* in express terms declares, that a master has no power to take up money on bottomry, in places where his owners dwell; otherwise he and his estate must be liable thereto.—If, indeed, the owners do not agree in sending the ship to sea, the majority shall carry it, and then money may be taken up by the master on bottomry for their proportion who refuse, although they reside upon the spot, and it shall bind them all. The two last rules are the same with the marine ordinances of *France* upon that point: for they also declare, that those who lend money to the master, in the place where the owners reside, without their consent, shall have no security or hypothecation, but on such part of the ship only as belongs to the master himself, even though the money was advanced for repairs, or for purchasing provisions. But that the shares of those owners, who refuse to send out the ship, shall be affected by the loan of money to the master for necessaries. The justice and propriety of such a regulation, are evident from considering that such a contract was only intended for the benefit of all parties in those places where the owners had neither a residence, nor any correspondents.

Laws of the Hanse Towns, art. 80.

Hobart, 11. Noy, 95.

Molloy, l. 2. c. 11. s. 11.

Molloy loc. cit.

Ord. of Lou. 14. tit. Avar. à la grosse, art. 8 & 9.

2 Valin Com. 10.

Pothier, Tr. du pret. à la grosse Avant. not. 6.

The contract of which we treat is of a different nature from almost all others: but that which it most nearly resembles is the contract of insurance: for the lender on bottomry or at respondentia, runs almost all the same risks, with respect to the property on which the loan is made, that the insurer does with respect

reſpect to the effects inſured. There are, however, ſome conſiderable diſtinctions; for inſtance, the lender ſupplies the borrower with money to purchaſe thoſe effects upon which he is to run the riſk: not ſo with the inſurer. There are alſo various other diſtinctions.

Vide the Introduction.

But however ſimilar they may be in other reſpects, they differ very much in point of antiquity. We have formerly endeavoured to ſhow that the contract of inſurance was certainly unknown to the traders of the ancient world: but it is equally clear that with the contract of bottomry and reſpondentia, or what was equivalent to it, they were perfectly acquainted. In thoſe fragments of the famous ſea laws of the *Rhodians*, which have been preſerved and tranſmitted to our times, I think there are very evident traces of this ſpecies of contract. In one ſection it is ſaid, "that when maſters of ſhips, who are proprietors of one "third of the lading, take up money for the voyage, whether "for the outward or homeward bound, or both; all tranſactions "ſhall paſs according to the writings drawn up between the "maſter and lender, and the latter ſhall put a man on board "the ſhip to take care of his loan." But in another place, theſe laws ſpeak more explicitly, and with a direct reference to the diſtinction between naval intereſt, and that which is given for a land riſk. "If maſters or merchants borrow money for their "voyages, the goods, freights, ſhips, and money, being free, "they ſhall not make uſe of ſuretyſhip, unleſs there be ſome "apparent danger either of the ſea or of pirates. And for the "money ſo lent, the borrowers ſhall pay *naval intereſt*." From theſe two quotations, little doubt can be entertained, but that the *Rhodians* uſed to borrow and lend, upon the hazard of the voyage, for an increaſed premium. It was formerly ſeen that the *Rhodian* laws in general were adopted by the *Romans*; and conſequently that branch of them, which relates to bottomry amongſt the reſt; for you can hardly open a book upon the *Roman* law, but you meet with chapters, *de nautico fœnore*, *de nauticis uſuris*, which plainly ſhow that this contract was well known to the juriſts of that diſtinguiſhed nation. It was alſo called by them *pecunia trajectitia*: becauſe it was given to the borrower to be employed by him in commerce upon and beyond the ſea. It appears from *Valin*, that ſome writers of the *French* nation had ſuppoſed, that this contract was wholly unknown to

Leg. Rhod. f. 1. art. 21.

Leg. Rhod. f. 2. art. 16.

Digeſt. lib. 22. tit. 2. Cod. lib. 4. tit. 33.

2 Valin. Com. 1.

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the ancients, and that it was peculiar to *France* alone. *Valin* very clearly expoſes the abſurdity of ſuch an idea; and it ſeems to be ſufficiently anſwered, if deſerving of an anſwer, by what has been already ſaid. In addition to this we may add, that ſo far from being peculiar to *France*, it has obtained a place in the codes of all the maritime ſtates, whoſe laws have been promulgated, or have been at all famous in the modern world. In this chapter we have already had occaſion to cite two paſſages from the judgments, or laws of *Oleron* upon the ſubject, as well as the 60th article of the laws of the *Hanſe* towns: and by a reference to the 45th article of the laws of *Wiſbuy*, it will be found, that the nature of bottomry, as well as its name, was perfectly known to the makers of thoſe ordinances.

Art. 1 & 22.

Laws of Wiſb. art. 45.

Le Guid. c. 18. art. 2.

In the *Guidon*, indeed, it is ſuppoſed that the contract of bottomry now in uſe, is not at all the ſame as that which was known to the ancients. This authority is reſpectable: but facts muſt ſpeak for themſelves; in addition to which, the celebrated *Emerigon* has obſerved, that the aſſertion of the author of the *Guidon* is only true with reſpect to the form which the modern regulations have given to this contract, the true origin of which is loſt in its antiquity.

2 Emerigon, p. 384.

In our definition of bottomry it was ſaid, that if the ſhip arrive ſafe, the lender ſhall be paid his principal, and the ſtipulated intereſt due upon it, however much it exceed the legal rate. The true principle, upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the riſk which the lender runs of loſing both principal and intereſt; for he runs the contingency of winds, ſeas, and enemies. It is therefore of the eſſence of a contract of bottomry, that the lender runs the riſk of the voyage; and that both principal and intereſt be at hazard; for if the riſk go only to the intereſt or premium, and not to the principal alſo, though a real and ſubſtantial riſk be inſerted, it is a contract againſt the ſtatute of uſury, and therefore void. This has been frequently ſo determined in our courts of law; and it is conſonant to the ideas of foreign writers.

Molloy, lib. 2. c. 11. ſ. 8. 13.

2 Veſ. 148.

2 Veſ. 154.

12 Ann. ſtat. 2. c. 1

Pothier, 6. Not. 16.

Sharpley v. Hurrell, Cro. Jac. 208.

An action of debt was brought upon an obligation. The defendant pleaded the ſtatute of uſury, and ſhowed, that a ſhip went

went to fiſh in *Newfoundland*, (which voyage might be performed in eight months,) and that the plaintiff delivered 50*l.* to the defendant, to pay 60*l.* upon the return of the ſhip off *Dartmouth*: and if the ſaid ſhip, by occaſion of leakage or tempeſt, ſhould not return from *Newfoundland* to *Dartmouth*, then the defendant ſhould pay the 50*l.* only; and if the ſhip never returned, he ſhould pay nothing. And it was held by all the court, not to be uſury within the ſtatute. For if the ſhip had ſtayed at *Newfoundland* two or three years, he ſhould have paid at the return of the ſhip but 60*l.*: and if the ſhip never returned, then nothing; ſo that the plaintiff ran the hazard of having leſs than the intereſt which the law allows; and poſſibly, neither principal nor intereſt.

This caſe was, upon another occaſion, mentioned in argument by one of the judges on the bench; the principle on which it was decided, was recognized, and the caſe itſelf allowed to be law. Roberts v. Tremayne, Cro Jac. 508.

So alſo in another caſe of debt upon an obligation, conditioned to pay ſo much money, if ſuch a ſhip returned within ſix months from *Oſtend* in *Flanders* to *London*, which was more by the third part than the legal intereſt of money; and if ſhe do not return, then the obligation to be void: the defendant pleaded that there was a corrupt agreement betwixt himſelf and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he ſhould have no more for intereſt than the law permits, in caſe the ſhip ſhould ever return; and avers that the obligation was entered into by covin, to evade the ſtatute of uſury, and the penalty thereof: upon this averment the plaintiff took iſſue, and the defendant demurred. Joy v. Kent, Hart. Rep. 418.

Lord Chief Baron *Hale*.—"Clearly this bond is not within the ſtatute, for this is the common way of inſurance; and if this were void by the ſtatute of uſury, trade would be deſtroyed. It is not like to the caſe, where the condition of the bond is to give ſo much money, if ſuch or ſuch a perſon be then alive; for there is a certainty of that at the time. But it is uncertain and a caſualty whether ſuch a ſhip ſhall ever return or not."

In another caſe of debt upon an obligation for 300*l.* the condition was, that if ſuch a ſhip went to *Surat* in the *Eaſt Indies*, Soome v. Gleen, 1 Sid. 27. 1 Lev. 54.

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and returned safe; or if the owner, or the goods laden on board the ship returned safe, then the defendant was to pay the principal to the plaintiff, and 40*l.* for each 100*l.*; but that if the ship should perish by unavoidable casualties of sea, fire, or enemies, to be proved by sufficient testimony, then the plaintiff should have nothing. The doubt was, whether this was an usurious contract; and it was said to be so, because the payment depended upon so many things, one of which, in all probability would happen. But the whole court held it not to be within the statute.

Lord Chief Justice *Bridgman* took a distinction between a bargain of this kind and a loan; for where there is a bargain, as here, and the principal is hazarded, that cannot be within the statute of usury; but it is otherwise of a loan, where the principal is not in danger. Here there are apparent risks of the sea, fire, and enemies, and the length of the voyage; all of which endanger the loss of the principal. These bottomry contracts are for the advancement of trade, and therefore judgment must be for the plaintiff.

These cases are all uniform in the principle which they go to establish, that, on account of the risk, the interest shall be larger than the common rate: but notwithstanding this, a case is to be found in the Equity Reports, which directly tends to destroy the rule of decision in all these cases.

Dandy v. Turner, 1 Equity Cases Abr. 273.

A part owner of a ship borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ship from the voyage she was then going in the service of the *East India Company*, who broke up the ship in the *East Indies*; and the owners brought their action against the Company, and recovered damages, which did not, however, amount to a full satisfaction. The plaintiff brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he was left to recover as well as he could at law; for a court of equity will never assist a bottomry bond, which carries *unreasonable interest*.

This case conveys a very unmerited censure upon bottomry bonds, not at all warranted by the long chain of uniform decisions

ſions in their favour. Indeed, from the very nature of the contract, they are to carry the naval intereſt, which is always greater than land intereſt, in proportion as the riſks run by the lender on bottomry are much greater than thoſe which a lender upon common bonds incurs (*a*).

To be ſure if a contract were made, by colour of bottomry, in order to evade the ſtatute, it would be uſurious and void, and highly deſerving of all the cenſure and diſcouragement which the courts, either of law or equity, could poſſibly throw upon it.

4 Com. Dig. 193. 2 Vef. 146.

In *England* then it is clear, from theſe caſes, that there is nothing unlawful in the contract of bottomry: but ſome writers in foreign countries have endeavoured to hold it up to the world, as an illicit and an uſurious bargain. *Straccha*, who has written upon inſurances, has introduced a long diſſertation to prove the truth of this poſition; and ſeveral other writers have either preceded or followed him in ſupport of the ſame doctrines. If, indeed, the money ſo lent were given merely by way of a loan, and ſuch exceſſive intereſt were demanded for the uſe of the money only; there might be force in the objection. But when it is conſidered as the price of the great riſks incurred, it has not the leaſt ſemblance of uſury; it is a fair and conſcientious contract, highly beneficial to the commerce and general intereſts of ſociety.

Introd. de Aſſecur. No. 26.

Theſe authors have met with very able oppoſers in *Pothier* and *Emerigon*, who have clearly ſhewn the fallacy of their doctrine; and they have proved to demonſtration, that even the fathers of the church have acknowledged, that this contract has nothing in it offenſive to religion or good morals. Almoſt all the writers of eminence agree with the two laſt named, as to the legality of loans on bottomry and at reſpondentia: and it is now univerſally admitted and practiſed in all the maritime and trading countries in *Europe*.

Pothier Avanture à la groſſe, Not. 2. 2 Emer. 390. Loccenius, lib. 2. c. 6. Not. 36. Roccus de Navibus et Naulo, Not. 50. 2 Black. Com. 457.

(*a*) Mr. *Fonblanque*, in his valuable edition of "A Treatiſe of Equity," has ſuppoſed that in the above paſſage I meant to complain of the interference of a Court of Equity in caſes where *exhorbitant naval intereſt* was demanded. But a little attention to the paſſage complained of, and alſo to what follows, will demonſtrate, that I only alluded to general cenſures upon a ſpecies of contract ſo highly beneficial for commercial purpoſes. See Fonbl. vol. i. p. 243.

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But as the hazard to be run is the very basis and foundation of this contract; it follows, that if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statutes of usury might be evaded. This was so decided in the Court of Chancery.

Deguilder v. Depeister, 1 Vern. 263.

The case was upon a bottomry bond, whereby the plaintiff was bound in consideration of 400*l.* as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be relieved. Upon the former hearing, as the ship lay all the time in the port of *London*, and there was no hazard of losing the principal, the Lord Keeper thought fit to decree, that the defendant should lose the premium of 40*l.* and be contented with his principal and *ordinary interest*. And now, upon a rehearing, he confirmed his former decree.

Pothier Traité à la Grosse Avanture, Not. 38. 2 Valin, 10.

With this decree, which is equitable and just, the *French* writers agree. They say, that in such acase, "L'emprunteur "fera bien obligé de rendre la somme qui lui a été prêtée, mais "il ne sera pas obligé de payer en outre la somme qu'il a promis "de payer pour le profit maritime; car le profit maritime étant "le prix des risques que le prêteur devoit courir des effets sur "lesquels le prêt été fait, il ne peut lui être dû de profit mari- "time quand il n'a couru aucuns risques, ne pouvant pas y avoir "un prix des risques, s'il n'y a pas eu de risques."

Vide the Appendix, No. 2.

Beawes Lex Merc. Red. 4th edit. p. 127.

Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from *London* to such a port abroad, &c. In such cases, the contingency does not commence till the departure: and therefore if the ship receive injury by storm, fire, &c. before the beginning of the voyage, the person borrowing alone runs the hazard. But if the condition be, "that if the ship shall not arrive at such a place by such a time, then," &c.; in these instances, the contract commences from the time of sailing, and a different rule, as to the loss, will necessarily prevail.

2 Magens, 28. 100.

We have shown at the beginning of this chapter, that the amount of the loan on bottomry or respondentia, in this country, is

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is not restrained by any regulation whatever; although it is in many maritime states by express ordinances: that the only restriction in the law of *England* is, with respect to money lent on ships and goods going to the *East Indies*, which, by statute, must not exceed the value of the property on which the loan is made. It remains then to see what those risks are, to which the lender undertakes to expose himself. These are for the most part mentioned in the condition of the bond, and are nearly the same, against which the underwriter, in a policy of insurance, undertakes to indemnify, "*Limita hoc singulariter, ut creditor "subeat periculum navigationis, in casibus fortuitis tantum.*" These accidents are, tempests, pirates, fire, capture, and every other misfortune, except such as arise either from the defects of the thing itself, on which the loan is made, or from the misconduct of the borrower: for, says the *Italian* lawyer, last quoted, in continuation of the above sentence, "*Secus est si infortunium, "vel naufragium ex culpâ debitoris processerit, quia tunc creditor "non tenetur de periculo, et damno, in quod incurritur ex culpâ "vehentis, prout in simili deciditur in materiâ assecurationis, ut "quantumcumque assecuratio sit generalis, non contineat periculum, "aut damnum, quod facto assecurati contingit.*"

19 Geo. 2. c. 37. s. 5.

Vide the Appendix, No. 2. Roccus de Navibus, Not. 51.

2 Valin, 14. Roccus, loc. cit.

It seems to have been a doubt late in the last century, whether a loss by the attacks of pirates fell within the words, perils of the sea; for it was argued in the King's Bench, in the reign of *James* the Second. But the Court were of opinion, that piracy was one of the dangers of the seas.

Barton v. Wolliford, Comb. 56.

The lender is answerable likewise for losses by capture; or to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore, if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole Court of King's Bench, in a case upon a bond of this nature; the proceedings on which were fully stated, when the unanimous opinion of the court

Joyce v. Williamson, B. R. Mich. Term, 23 Geo. III.

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court was delivered by Lord *Mansfield*.—" This comes before the court upon a motion, on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at *New York*, the port of destination; 3dly, that the ship was captured. Upon the two first pleas issue was joined: and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial, are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one eight for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that by the law of *England there is neither average nor salvage upon a bottomry bond*. It was indeed contended at the bar on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by *capture*, &c. the bond should be void: and that here there was a capture, and a detention for one month. But upon consideration, we think that a capture within this condition does not mean a *temporary capture*, but it *must be a total loss*: now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship: but we are all of opinion, that the verdict is right, and that the rule for a new trial must be discharged.

From the case we not only learn what shall be deemed a capture, within the meaning of that word in a bottomry bond, but we derive from it a piece of very essential information, namely, that

thar a lender on bottomry, or at reſpondentia, is neither entitled to the benefit of ſalvage, nor liable to contribute in caſe of a general average. This was expreſsly ſaid by Lord *Mansfield* in delivering the judgment of the court. His Lordſhip's opinion is confirmed by the ſtatu e of the 19th of *George* the Second, c. 37. which allows the benefit of ſalvage to lenders upon ſhips or goods going to the *Eaſt Indies*; clearly ſhewing that there was no ſuch thing at the Common Law, otherwiſe there was no occaſion to make ſuch a proviſion.

19 Geo. 2. c. 37. ſ. 3.

In this reſpect our law differs from that of *France*, for the ordinances, and indeed it ſeems always to have been the caſe in that country, expreſsly declare, that the lenders on bottomry ſhall be ſubject to general or groſs average, in the ſame manner as inſurers are upon policies of inſurance; for that as theſe contracts depend upon the ſame principles, they are ſubject to the ſame regulations.

Le Guidon, c. 19. art. 5. 2 Valin, 19. 2 Emer. 504.

Our law in this reſpect is different alſo from that of *Denmark*. This lately appeared in a cauſe tried in the King's Bench before Lord *Kenyon* at *Guildhall*.

In was an action on a policy of inſurance upon a *reſpondentia* bond on ſhip and goods, at and from *B.* to *C.* The ſhip was *Daniſh*, and an average loſs was ſuſtained upon the goods to the amount of 6*l.* 15*s.* *per cent.* and the plaintiff, as holder of a *reſpondentia* bond, had been called upon to contribute; and now brought his action againſt the *Engliſh* underwriters for the amount of that contribution.

Walpole v. Ewer, Sitt. after Trin. 1789.

Lord *Kenyon* Chief Juſtice.—"By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes; but is entitled to receive the whole ſum advanced, provided ſhip and cargo arrive at the port of deſtination. The plaintiff contends, that as by the law of *Denmark*, ſuch lenders upon reſpondentia are liable to average, and bound to contribute according to the amount of their intereſt, the inſurer muſt anſwer to them. The *Daniſh* Conſul has proved that he received a judgment of the Court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has ſtated it. The opinions of

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several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight, than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if in this case, the underwriters were bound by the law of the country, to which the contract relates." Verdict for the plaintiff (*a*).

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the tract of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

(*a*) This is not the only case, in which the insurers have been held liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved; and upon that the learned judge much relied, and seems to have doubted the general rule as afterwards stated by Lord *Kenyon* in the case of Walpole v. Ewer.

Newman v. Cazalet, Sittings at Guildhall after Hilary.

It was an action on a policy, upon a cargo of fish from *Newfoundland* to any port of *Spain*, *Portugal*, or *Italy*. The ship met with bad weather, and put into *Alicant* and *Legborn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which appears to be a very extraordinary one) adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third: and they also charged as a part of the general average, the seamen's wages and provisions, while in port. The defendant, as underwriter, had paid into court as much as would cover the average; if adjusted according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether the plaintiff having been compelled to pay beyond that sum, according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. The plaintiff called several brokers, who said that in repeated instances they had adjusted averages under similar sentences of the court of *Pisa*; and the underwriters, though with reluctance, had always paid them.

Mr. Justice *Buller*.—"On the general law, the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken." The plaintiff had a verdict accordingly.

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An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months, 650*l.* If she returned not within 24 months, then to pay 5*l.* *per* month above 650*l.* till the 36 months: and if she returned not within 36 months, then to pay 710*l.* unless it can be proved by *Wildy*, that the ship returned not, but was lost within 36 months. The ship, in fact, went from *London* to *Bantam*, and from *thence to Surat*, and other parts, and so returned to *Bantam*: and in her voyage from *Bantam* to *London*, was lost within 36 months: upon which the present action was brought.

Western v. Wildy, Skinn. 152.

The court inclined to be of opinion, that the ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

In another case of debt upon a bottomry bond, the defendant pleaded, that the ship went from *London* to *Barbadoes*, *sine deviatione*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost in *voyagio prædicto*; the plaintiff replied, that the ship in her return went from *Barbadoes* to *Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shows a deviation. The defendant rejoined, that she was pressed into the king's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from *London* to *Barbadoes* without deviation, and that in the return she was lost in the voyage aforesaid:

Williams v. Steadman, Holt's Rep. 126. Skin. 345. S. C.

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said: but it does not ſhow *without deviation*. Now the condition is ſo in expreſs words, and he ought to ſhow expreſsly that he has performed the words of the condition.

1 Eq. Caſes, Abr. 372
2 Ch. Caſes, 130.

The ſame rule of deciſion has been adopted in the Courts of Equity.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*: the ſhip was to go *from Holland to the Spaniſh iſlands, and to return to England*: but if ſhe periſhed, the defendant was to loſe his 50*l.* The ſhip went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africa*, then went to *Barbadoes*, and periſhed at ſea. The plaintiff, being ſued at law upon the bond, came into equity, ſuggeſting that *the deviation was through neceſſity*. But this bill was diſmiſſed, except as to the penalty.

C. 1.

There is no reſtriction by the law of *England* as to the perſons, to whom money may be lent on bottomry, or at reſpondentia (*a*). In a former part of this work, we gave the hiſtory of a ſtatute introduced into our code of laws, to prevent inſurances from being made on the ſhips or goods of *Frenchmen*, during the then exiſting war with *France*. The ſame ſtatute alſo prohibited his majeſty's ſubjects from lending money on bottomry or at reſpondentia on any ſhips or goods belonging to *France*, or to any of the *French* dominions or plantations, or the ſubjects thereof: and in caſe they ſhould, ſuch contracts were declared void; and the parties thereto, or the agent or broker interfering therein were to forfeit 500*l.* That act was not of long continuance, on account of the peace, which almoſt immediately followed it: and theſe reſtraints upon this ſpecies of contract were never again revived by any ſubſequent poſitive law (*b*).

21 G. 2. c. 4.

Lex Merc. Red 4th ed. p. 128.

It frequently happened, as appears by the preamble to the following ſtatute, that the borrowers on bottomry or at reſpondentia, became bankrupts after the loan of the money, and before the

(*a*) See one exception as to loans on the ſhips of foreigners trading to the *Eaſt Indies*, ante, page 553.

(*b*) See the arguments as to the legality of inſuring the property of an enemy, ante, p. 314. which neceſſarily tend alſo to prevent this ſpecies of contract from being entered into with an enemy.

event

event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commiſſion, and the lenders were left to ſuch redreſs as they could obtain from the bankrupt, who had previouſly given up every thing to his other creditors. This being likely to prove a diſcouragement to trade, parliament was obliged to interpoſe; and it accordingly enacted, "That the obligee in any bottomry or reſpondentia bond, made and entered into upon a good and valuable conſideration, *bonâ fide*, ſhould be admitted to claim, and *after the contingency ſhould have happened, to prove his or her debt or demands in reſpect of ſuch bond, in like manner as if the contingency had happened before the time of the iſſuing of the commiſſion of bankruptcy againſt ſuch obligor*, and ſhould be entitled unto, and ſhould have and receive a proportionable part, ſhare, and dividend of ſuch bankrupt's eſtate, in proportion to the other creditors of ſuch bankrupt, in like manner as if ſuch contingency had happened before ſuch commiſſion iſſued: and that all and every perſon or perſons, againſt whom any commiſſion of bankruptcy ſhould be awarded, ſhould be diſcharged of and from the debt or debts owing by him, her, or them, on every ſuch bond as aforeſaid, and ſhould have the benefit of the ſeveral ſtatutes now in force againſt bankrupts, in like manner, to all intents and purpoſes, as if ſuch contingency had happened, and the money due in reſpect thereof had become payable before the time of the iſſuing of ſuch commiſſion." 19 Geo. 2. c. 32. ſ. 2.

By the ſtatute book it appears, that the maſters and mariners of ſhips having taken upon bottomry greater ſums of money than the value of their adventure, had been accuſtomed wilfully to caſt away, burn, or otherwiſe deſtroy the ſhips under their charge, to the great loſs of the merchants and owners: it was therefore enacted, "That if any captain, maſter, mariner, or other officer belonging to any ſhip, ſhould wilfully caſt away, burn, or otherwiſe deſtroy the ſhip unto which he belonged, or procure the ſame to be done, he ſhould ſuffer death as a felon." The duration of this act having been limited to three years, it became extinct: but the neceſſity of ſuch a proviſion was ſo great, that a ſimilar law was made a few years afterwards, and is ſtill in force. 16 Ch. 2. c. 6. ſ. 12. 22 & 23 Ch. 2. c. 11. ſ. 12.

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As the commerce of the country increaſed to an amazing degree, ſo the cuſtom of lending money on bottomry became alſo very prevalent: and as the lenders had ſubjected themſelves to great riſks, they began to think it neceſſary to protect their property, by inſuring to the amount of the money lent. In a former chapter, much was ſaid of the mode by which inſurances on ſuch property were to be effected; and we then ſaw from the caſe of *Glover* v. *Black*, that it was neceſſary to inſert in the policy that the intereſt inſured was bottomry or reſpondentia, and that ſuch was the law and practice of merchants. From this caſe too it is evident, that when a perſon has inſured a bottomry or reſpondentia intereſt, and he recovers upon the bond, he cannot alſo recover upon the policy: becauſe he has not ſuſtained a loſs within the meaning of his contract; and to ſuffer any man to receive a double ſatisfaction, would be contrary to the firſt principles of inſurance law. As it is merely a contract of indemnity, a man ſhall never receive leſs; nor can he be entitled to recover more than the amount of the damage he has, in fact, ſuſtained.

Vide ante, c. 1. 3 Burr. 1394.

CHAPTER THE TWENTY-SECOND.

Of Inſurance upon Lives.

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AN Inſurance upon Life is a contract, by which the underwriter for a certain ſum, proportioned to the age, health, profeſſion, and other circumſtances of that perſon, whoſe life is the object of inſurance, engages that the perſon ſhall not die within the time limited in the policy: or if he do, that he will pay a ſum of money to him in whoſe favour the policy was granted. Thus if *A.* lend 100*l.* to *B.* who can give nothing but his perſonal ſecurity for repayment: in order to ſecure him, in caſe of his death, *B.* applies to *C.* an inſurer, to inſure his life in favour of *A.* by which means, if *B.* die within the time limited in the policy, *A.* will have a demand upon *C.* for the amount of his inſurance.

1 Poſtlethw. Dict. of Tr. p. 150. Vide the Appendix, No. 3. 2 Blac. Com 459.

The advantages reſulting from ſuch inſurances are many and obvious: and moſt of them may be reduced under the following claſſes. To perſons poſſeſſed of places or employments for life; to maſters of families, and others, whoſe income is ſubject to be determined, or leſſened, at their reſpective deaths; who, by inſuring their lives, may ſecure a ſum of money for the uſe of their families. To married perſons, where a jointure, penſion, or annuity, depends on both or either of their lives, by inſuring the life of the perſons entitled to ſuch annuity, penſion, or jointure. To dependents upon any other perſon, during whoſe life they are entitled to a ſalary or benefaction, and whoſe life being inſured, will enable ſuch dependents, at the death of their benefactor, to claim from the inſurers a ſum equal to the premium paid. To perſons wanting to borrow money, who, by inſuring their lives, are enabled to give a ſecurity for the money borrowed. Theſe, and many other advantages, being ſo obvious, the Biſhop of *Oxford*, Sir *Thomas Allen*, and ſome other gentlemen, were induced to apply to Queen *Anne* to obtain her charter for incorporating them and their ſucceſſors, whereby they

1 Poſtlethw. 150.

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might provide for their families, in an eaſy and beneficial manner. Accordingly, in the year 1706, her majeſty granted her royal charter, incorporating them by the name of "The Amicable Society for a perpetual Aſſurance Office," giving them a power to purchaſe lands, an ability to ſue and be ſued in their corporate capacity, and a common ſeal for the more eaſy and expeditious management of the affairs of the Company.

The benefits, which accrued to the public from this ſpecies of contract, were found to be ſo extenſive, that another office was eſtabliſhed by deed enrolled in the Court of King's Bench at *Weſtminſter*, for the inſurance of lives only. The name of this office is the "*ſociety for equitable aſſurance on lives and ſurvivorſhips.*" Beſides this, the two Companies of the *Royal Exchange* and *London* Aſſurance, obtained his majeſty's charter, to enable them alſo to make inſurance on lives. The charter points out the advantages of ſuch inſtitutions; for it ſtates as the ground, on which ſuch a permiſſion is to be granted, "That it "has been found by experience to be of benefit and advantage, "for perſons having offices, employments, eſtates, or other "incomes, determinable on the life or lives of themſelves or "others, to make aſſurances on the life or lives, upon which "ſuch offices, employments, eſtates, or incomes are determi-"nable (*a*)." Private underwriters alſo may enter into policies of this nature, as well as any other, provided the party, making the inſurance, chuſes to truſt their ſingle ſecurity.

(*a*) An act paſſed in the 39 *Geo.* 3. (ch. 83.) for incorporating a new inſurance company, called *The Globe Inſurance Company*, the ſecond ſection of which authorizes them (among other things) to make inſurances on the life or lives of any perſon or perſons whomſoever; and to grant, purchaſe, and ſell annuities for lives, or on ſurvivorſhip, and grant ſums of money, payable at future periods, within the kingdom of *Great Britain* or *Ireland*, and any other parts abroad, whether within his Majeſty's dominions or not; and ſhall and may receive depoſits of funds of tontine ſocieties, and other inſtitutions eſtabliſhed for granting future advantages, and depoſits of funds belonging to, and act as treaſurer thereof for benefit or friendly ſocieties, and other charitable and benevolent inſtitutions; and make proviſion for the widows and children of the clergy, and for clergymen, and receive depoſits from or on account of members of the induſtrious claſſes of ſociety, and others; and to make proviſion for members of the induſtrious claſſes of ſociety, and others, by allowing intereſt on ſuch depoſits made, or otherwiſe, upon ſuch terms and conditions, and in ſuch manner, as ſhall or may be agreed upon between the ſaid corporation ſo to be created and eſtabliſhed, and the perſons and ſocieties treating with the ſaid corporation, for the purpoſes thereinbefore mentioned.

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The antiquity of this practice cannot be very eaſily aſcertained; however, we find traces of it in ſome very old authors. In the *French* book, entitled *Le Guidon*, we find it mentioned, as a contract perfectly well-known, at that time, in other countries. The author of that book, however, tells us in the ſame paſſage, that it was a ſpecies of contract wholly forbidden in *France*, as being repugnant to good morals, and as opening a door to a variety of frauds and abuſes. Such, indeed, the law of *France* continues at this day: and inſurances upon lives are prohibited in other countries of *Europe* by poſitive regulation. The ſame *French* author has, however, gone a little too far in aſſerting, that the other countries, in which they had been till that time encouraged, were alſo obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the laws of *Wiſbuy*: and in *England* they never had been prohibited. The learned *Roccus* alſo takes notice of them as legal contracts, and quotes various authors in ſupport of his opinion.

Le Guidon, c. 16. art. 5. publiſhed in 1661.

2 Valin, 54.

2 Mag. 70.

Le Guid. loc. cit.

Roccus de Aſſec. Not. 74.

Theſe inſurances being thus ſanctioned in *England* by royal authority, and the funds of the different ſocieties having very much increaſed, and being fixed on a ſtable and permanent foundation, contracts of this nature became ſo much a mode of gambling (for people took the liberty of inſuring any one's life, without heſitation, whether connected with him, or not, and the inſurers ſeldom aſked any queſtion about the reaſons, for which ſuch inſurances were made) that it at laſt became a ſubject of parliamentary diſcuſſion. The reſult of that diſcuſſion was, that a ſtatute paſſed, by which it was enacted, "That no "inſurance ſhould be made by any perſon or perſons, bodies "politick or corporate, *on the life or lives* of any perſon or per- "ſons, or on any other event or events whatſoever, wherein the perſon or perſons, for whoſe uſe, benefit, or on whoſe "account, ſuch policies ſhould be made, *ſhould have no intereſt* "*or by way of gaming or wagering*; and every inſurance made "contrary to the true intent and meaning thereof, ſhould be "null and void to all intents and purpoſes." And in order more effectually to guard againſt any impoſition or fraud, and to be the better able to aſcertain, what the intereſt of the perſon, entitled to the benefit of the inſurance, really was, it was further enacted, by the ſame ſtatute, "that it ſhould not be lawful "to

1 Mag. 33.

14 Geo. 3. c. 48. ſ. 1.

Sect. 2.

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" to make any policy or policies on the life or lives of any per-
" ſon or perſons, or other event or events, without inſerting in
" ſuch policy or policies, the perſon's name intereſted therein,
" or for whoſe uſe, benefit, or on whoſe account, ſuch policy
Sect. 3. " was ſo made or underwrote. And that in all caſes where the
" inſured had an intereſt in ſuch life or lives, event or events,
" no greater ſum ſhould be recovered, or received from the in-
" ſurer or inſurers, than the amount or value of the intereſt of
" the inſured in ſuch life or lives, or other event or events.
Sect. 4 " That nothing in the act contained ſhall extend, or be con-
" ſtrued to extend, to inſurances *bonâ fide* made by any perſon
" or perſons, on ſhips, goods, or merchandizes; but every ſuch
" inſurance ſhall be as valid and effectual in law, as if this act
" had not been made."

It has been held that a perſon, holding a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note.

Dwyer v. Edie, Lond. Sittings after Hil. 1788.

An action was brought on a policy on the life of *James Ruſſell* from the 1ſt of *June* 1784 to the 1ſt of *June* 1785. *Ruſſell* was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the ſum of 500*l.* due from *Ruſſell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant: 1ſt, That part of the conſideration for the note was money won at play: 2dly, That *Ruſſell* at the time he gave the note was an infant.

Mr. Juſtice *Buller* nonſuited the plaintiff upon the ground of part of the conſideration of the note being for a gaming tranſaction; and therefore there was a want of intereſt in the plaintiff. But as to the other objection on account of infancy, the intereſt muſt be contingent, for *Ruſſell* might or might not avoid his note; and he doubted much whether till ſo avoided, the note muſt not be taken againſt a third perſon to be the note of an adult, for the maker of the note only could take the objection (*a*).

But

Cowp. 737.

(*a*) There is a caſe of *Reebuck* v. *Hammerton*, in which a policy made, in order to decide upon the ſex of a particular perſon, was held to fall within the prohibition of this ſtatute.

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But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy.—Thus in an action on a policy of insurance on the life of Lord *Newhaven* from the 1st of *December* 1792 to the 1st of *December* 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 *Geo.* 3. c. 48. It appeared in evidence that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large sum of money, part of which debt had been assigned by them to another person; the remainder, being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.

Anderson v. Edie, B. R. Lond. Sitt. in Trinity Term, 1795.

Lord *Kenyon* was of opinion, that this debt was a sufficient interest: and said, that it was singular, that this question had never been *directly* decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security. Verdict for the plaintiff.

So also in a previous case, where an action was brought on a policy on the life of *William Holden* from the 17th *August* 1790 to *August* 1791, and during the life of the plaintiff; *Holden* had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make assurance. Lord *Kenyon* thought this a sufficient interest in the executor to support the action. The cause proceeded, therefore: but the defendant had a verdict afterwards upon a different ground.

Tidswell v. Angerstein, Peak's N. P. Cases, 151.

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statute. In another case, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th *July* 1778, Lord *Mansfield* said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace; but I doubt whether that be an interest within the act. But, 2dly, The policy is void, by not having the name inserted according to the second section of the statute.

Mollison v. Staples, Sitt. at Guildhall, Mich. Vac. 1778.

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But if after the death of the debtor, his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator.

Godsall & others v. Boldero & others, 9 East, 72.

This point was decided in an action brought by Messrs. Godsalls, coachmakers, against the directors of the Pelican Life Insurance Company, on a policy on the life of the late Right Honourable *Wm. Pitt*; and the declaration averred that the plaintiffs were interested in his life at the time of making the insurance, and till the time of his death to the amount of the sum insured. One of the pleas, and the material one stated, that the debt due to the plaintiffs was *after the death of Mr.* Pitt, *and before the exhibiting of the plaintiffs' bill*, fully paid to the plaintiffs by the Earl of *Chatham* and the Lord Bishop of *Lincoln*, executors of the will of Mr. *Pitt*. Issue was taken on the fact of payment by the executors. Upon the trial of this cause before Lord *Ellenborough* a case was reserved for the opinion of the Court, stating that Mr. *Pitt* died on the 23d *January* 1806; that the defendants were served before Trinity Term with process issued on the 3d *June* 1806: that Mr. *Pitt*, at the time of the execution of the policy, was indebted to the plaintiffs, and continued so till his death in upwards of 500*l.* the sum insured, and died insolvent. That on the 6th *March* 1806, the executors of Mr. *Pitt* paid to the plaintiffs, out of the money granted by parliament for the payment of Mr. *Pitt*'s debts, 1109*l.* as in full for the debt due to them from Mr. *Pitt*. After argument at the bar, and time taken to deliberate, the judgment of the Court was pronounced by

Lord *Ellenborough*.—"This was an action of debt on a policy of insurance on the life of the late Mr. *Pitt*, effected by the plaintiffs, who were creditors of Mr. *Pitt* for the sum of 500*l.* The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. (His Lordship, after stating the pleadings and the case, proceeded.)—This assurance, as every other to which the law gives effect, (with the exceptions only contained in the 2d and 3d sections of the stat. 19 *Geo.* 2. c. 37.) is in its nature a contract of *indemnity*, as distinguished

distinguished from a contract by way of *gaming* or *wagering*. The interest, which the plaintiffs had in the life of Mr. *Pitt*, was that of creditors, and the probability of loss which resulted from his death. The event, against which the indemnity was sought by this assurance, was substantially the expected consequence of his death, as affecting the interest of these individuals assured in the loss of their debt. This action is in point of law founded on a supposed damnification of the plaintiff, occasioned by his death, existing, and continuing to exist at the time of the action brought: and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. *Pitt*, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance,) originally belong to the executors, as the part of assets of the deceased: for though it were derived *aliunde* the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord *Mansfield* in *Hamilton* v. *Mendes*, 2 Burr. 1210. The words of Lord *Mansfield* are, "The plaintiff's demand is for an "*indemnity*: his action then must be founded upon the nature "of the *damnification*, as it really is at the time the action is "brought. It is repugnant, upon a contract for indemnity, to "recover as for a total loss, when the event has decided that "the damnification in truth is an average, or perhaps no loss at "all. Whatever undoes the damnification in the whole, or in "part, must operate upon the indemnity in the same degree. "It is a contradiction in terms to bring an action for *indemnity* "where, upon the whole event, *no damage* has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea."

The

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The remaining obſervations and rules upon this ſubject are very few and ſhort: becauſe thoſe general rules and maxims, upon which ſo much has been ſaid with regard to inſurances in general, are alſo applicable to this ſpecies of them: the ſame mode of conſtruction is to be adopted: fraud will equally affect the one as the other; the ſame attention muſt be paid to a rigid compliance with warranties; and the ſame rules of proceeding are to be followed.

Aveſon v. Lord Kinnard. 6 Eaſt. 188.

It lately became a queſtion, in an action by a huſband on a policy on the life of his wife, whether the declarations of the wife as to her ſtate of health, then lying in bed apparently ill, deſcribing the bad ſtate ſhe was in, at her going to M. (whither ſhe went to be examined by the ſurgeon preparatory to the inſurance being made) down to that time, and her fear that ſhe could not live 10 days longer when the policy would be returned, were admiſſible in evidence. It was held they were.

Vide the Appendix, No. 3.

With reſpect to the riſk, which the underwriter is to run, this is uſually inſerted in the policy; and he undertakes to anſwer for all thoſe accidents to which the life of man is expoſed unleſs the *ceſtuy que vie* put himſelf to death, or he die by the hand of juſtice. The policy, as to the riſk, generally runs in theſe words: "The ſaid inſurers, in conſideration of the ſum "paid, do aſſure, aſſume, and promiſe, that the ſaid *A. B.* ſhall, "by the permiſſion of Almighty God, live and continue in this "natural life for and during the ſaid term, or in caſe he the "ſaid *A. B.* ſhall, during the ſaid time, or before the full end "and expiration thereof, happen to die by any ways or means "whatſoever, ſuicide or the hands of juſtice excepted, then," *&c.* We ſee, that this contract expreſsly ſays, the death muſt happen within the time limited, otherwiſe the inſurers are diſcharged. But ſuppoſe a *mortal wound* is received during the exiſtence of the policy, and the perſon languiſhes till after the term limited in the contract, what ſays the law? Agreeably to the deciſion of this point, in caſes of marine inſurances, not only the cauſe of the loſs, but the loſs itſelf, muſt actually happen, during the time named in the policy, otherwiſe the inſurers are not reſponſible. This very caſe was put by Mr. Juſtice *Willes*, in his argument, when delivering the opinion of the court,

Vide ante, c. 2. p. 41.

court, in the case of *Lockyer* v. *Offley*. Suppose, said the learned judge, an insurance upon a man's life for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies after the year, the insurer would not be liable.

Vide ante, p. 43.

But when an insurance is made upon a man's life, who goes to sea, and the ship in which he sailed was never afterwards heard of, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

Thus in an action on a policy of insurance on the life of *L. Macleane* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778, it appeared in evidence that about the 28th of *November* 1777, *Macleane* sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, Whether *Macleane* died before the 30th of *January* 1778? In order to establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Macleane*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost. That the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.

Patterson v. Black. Sitt. at Guildhall, Hil. Vac. 1780.

Lord *Mansfield* left it to the jury, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Macleane* died before the expiration of the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

These insurances, when a loss happens upon them, must be paid according to the tenor of the agreement, in the *full sum* insured, as this sort of policy, from the nature of it, being on the life or death of man, does not admit of the distinction between total and partial losses.

Lex Mere. Red. 4th ed. p. 294.

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We have seen that private persons, as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts after the policy was underwritten, but before a loss happened, it became a question, Whether the persons interested in such insurances could claim the money, and prove the debt, under the commission, as if the loss had happened before it issued. In the chapter immediately preceding this, and in one prior to that, we took occasion to observe, that in order to remedy an inconvenience of this nature with respect to marine insurances and bottomry bonds, a statute had passed allowing creditors, either on such policies, or bottomry and respondentia bonds, to prove their debts under the commission, as if the loss or contingency had happened prior to that event. But as the words of the preamble to that section of the statute were special, referring only to insurances on ships, and goods, or contracts of bottomry, it was doubtful whether it extended to insurances on lives, although the words of the enacting part were very general, namely, "the assured in *any policy of assurance*," *&c.* In support of this doubt it was urged, that great inconveniences would follow from extending the statute to these policies, because the risk may remain unsettled for a long and indefinite number of years. The court, however, held, that the general words of the enacting part were not restrained by the preamble.

Vide ch. 21. and ch. 14.

19 Geo. 2. c. 37. s. 2.

This doctrine was laid down in an action on a policy of insurance on the life of *J. H. Byd*, lately gone to the *East Indies*, on the event of his dying between the 5th of *April* 1780, and the 5th of *April* 1783. The defendant pleaded; 1st, Bankruptcy generally; and that the cause of action accrued before the bankruptcy: 2dly, That *the policy was made prior to the time of his becoming a bankrupt*, then the trading, petitioning creditor's debt, commission, proceedings, and certificate were specially set out, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying, that the cause of action accrued before the bankruptcy. To this last plea there was a general demurrer.

Cox v. Liotard, B. R. Hil. 24. G. 3. Dougl. Rep. p. 166. note.

Lord *Mansfield*.—"The only question is, whether the *enacting words* of this statute, which are *general*, shall be restrained by the *preamble*, which is *particular*. I think they should not be restrained. The enacting clause comprehends *all* insurances and

and consequently insurances *upon lives*. This is exactly the case of *Pattison* v. *Banks* (*a*); for there the preamble was *particular*, but the enacting clause was *general*."

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurred.

Mr. Justice *Buller*.—"In the case of *Mace* v. *Cadell*, it was held, that the enacting words of the statute of the 21st of *Ja.* 1. c. 19. were not restrained by the preamble (*b*). The inconveniences that have been urged, are not so great as are apprehended; for the creditors need not be delayed in their dividend. When a creditor has an insurance of this kind, he has nothing to do but lay to it before the commissioners, who will make a calculation, and lay aside as much as will give him a dividend equal to that of the other creditors. There must be judgment for the defendant."

It became a doubt in the reign of King *William*, when a policy on a life was to run from the day of the date thereof, till that day twelvemonth, and the person died on the day named, whether the insurer was liable. The court held that he was. The case was this: A policy of insurance was made to insure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, about one

Sir Robert Howard's case, 2 Salk. 625. 1 Ld. Raymond, 480. S. C.

(*a*) The question in *Pattison* v. *Banks*, (*Cowp. Rep.* 540.) arose upon the 7 *Geo.* 1. c. 31. which allowed persons, who had given credit on bills, bonds, notes, and other securities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commission. The preamble to the statute speaks of securities only for the sale of goods and merchandizes; but as the enacting words were general, the court held, that they extended to a bond for the payment of an annuity for a term of years.

(*b*) The statute of *James* enacts, "that if any person, at such time as he shall become bankrupt, shall, *by the consent of the true owner, &c.* have in his possession, "&c. any goods, &c. whereof he shall be reputed owner; the commissioners shall "have power to sell the same in like manner as any other part of the bankrupt's estate." The preamble says, "whereas it often happens that many persons before they become "bankrupts, *do convey their goods* to other men, upon good consideration, and yet retain the possession, and are reputed owners thereof," &c. The court, in *Mace* v. *Cadell* (*Cowp.* 232.), held, that the statute extended to the goods of a *third person*, which he allowed the bankrupt to keep possession of, as well as to those which *originally* belonged to the bankrupt, although the statute speaks only of the bankrupt's *original* property.

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o'clock in the morning. Lord *Holt* held that from the day of the date excludes the day, but from the date includes it (*a*); so that the day of the date must be excluded here, and the underwriter is liable.

Vide the Appendix, No. 3.

Although from a perusal of the note below, it will appear that no difficulty could occur on such a point at the present day; yet it is usual, in order to prevent disputes, to insert in the modern policies "*the first and last days included.*"

Policies on lives are equally vitiated by fraud or falsehood, as those on marine insurances; because they are equally contracts of good faith, in which the underwriter, from necessity, must rely upon the integrity of the insured for the statement of circumstances. Indeed, the case of *Wittingham* v. *Thornborough*, which we took the occasion to cite in support of the doctrine laid down in the chapter upon fraud in Marine insurances, was a policy upon a life insurance.—In another case, the principles of fraud were considered as far as it affects this contract.

Vide ante, 284.

Stackpole v. Simon, Sitt. at Guildhall, Hilary Vac. 1779.

It was an action on a policy of insurance for 150*l.* at four guineas *per cent.* in case *Drury Sheppey* should die at any time between the 1st of *April* 1777 and the 1st of *April* 1778, both days included, and during the life-time of *John Sheppey*, the father of *Drury:* but in case the said *John* should die before the said *Drury*, the policy to be void; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 900*l.* due from *Drury Sheppey* to the plaintiff. It was admitted, that the life expired within the time limited in the policy. *Drury Sheppey* had a place in the Custom-house of *Ireland*, and was in bad circumstances. He went to

(*a*) In the law books, not perhaps much to the honour of the profession, this distinction taken by Lord *Holt* was at one time held to be law, at others not: sometimes, these expressions were held to mean the same thing; at others to be quite different. In the year 1777, however, this glaring absurdity was entirely done away, and the Court of King's Bench unanimously held, after much deliberation, that they mean the same thing; and they shall either be exclusive or inclusive, according to the context and subject matter, and shall be so construed as most effectually to support the deeds of the parties, and not to destroy them. See Lord *Mansfield's* very elaborate argument upon this occasion, in which all the cases are fully stated and considered. *Pugh* v. *The Duke of Leeds, Cowper's Reports*, 714.

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the South of *France* for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

Lord *Mansfield.*—" As to the intereſt, this policy may be conſidered as a collateral ſecurity for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the riſk of its being a good life or not. If there be a concealment of the knowledge of the ſtate of the life, it is a fraud. It is a rule that every ſubſequent underwriter gives credit to the repreſentation made to the firſt; and it is allowed that any ſubſequent underwriter may give in evidence a miſrepreſentation to the firſt. The broker here does not pretend to any knowledge of his own, but ſpeaks from *information.* There is no fraud in him." There was a verdict for the plaintiff.

Even where there is an expreſs warranty, that the perſon is in good health, it is ſufficient that he is in a reaſonable good ſtate of health; for it never can mean, that the *ceſtui que vie* is perfectly free from the ſeeds of diſorder. Nay, even if the perſon, whoſe life was inſured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the inſurer is liable.

Thus in an action on a policy made on the life of Sir *James Roſs* for one year, from *October* 1759 to *October* 1760, *warranted in good health at the time of making the policy:* the fact was, that Sir *James* had received a wound at the battle of *La Feldt* in the year 1747, in his loins, which had occaſioned a partial relaxation or palſy, ſo that he could not retain his urine or *fæces*, and which was not mentioned to the inſurer. Sir *James* died of a malignant fever within the time of the inſurance. All the phyſicians and ſurgeons, who were examined for the plaintiff, ſwore, that the wound had no ſort of connection with the fever; and that the want of retention was not a diſorder, which ſhortened life, but he might, notwithſtanding that, have lived to the com-

Roſs v. Bradſhaw, 1 Blac. Rep. P. 312.

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mon age of man: and the ſurgeons who opened him, ſaid, that his inteſtines were all found. There was one phyſician examined for the defendant, who ſaid, the want of retention was paralytick; but being aſked to explain, he ſaid, it was only a local palſy, ariſing from the wound, but did not affect life: but on the whole he did not look upon him as a good life.

Lord *Mansfield*.—"The queſtion of fraud cannot exiſt in this caſe. When a man makes inſurance upon a life generally, without any repreſentation of the ſtate of the life inſured, the inſurer takes all the riſk, unleſs there was ſome fraud in the perſon inſuring, either by his ſuppreſſing ſome circumſtances, which he knew, or by alleging what was falſe. But if the perſon inſuring knew no more than the inſurer, the latter takes the riſk. In this caſe there is a warranty, and wherever that is the caſe, it muſt at all events be proved, that the party was a good life, which makes the queſtion on a warranty much larger than that on fraud. Here it is proved that there was no repreſentation at all, as to the ſtate of life, nor any queſtion aſked about it: nor was it neceſſary. Where an inſurance is upon a repreſentation, every material circumſtance ſhould be mentioned, ſuch as age, way of life, &c. But where there is a warranty, then nothing need be told; but it muſt in general be proved, if litigated, *that the life was, in fact, a good one, and ſo it may be, though he have a particular infirmity.* The only queſtion is, *Whether he was in a reaſonable good ſtate of health, and ſuch a life as ought to be inſured on common terms?* The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

Willis v. Poole, Sitt. at Guildhall, Eaſter Vac. 1780.

In a ſubſequent caſe, the ſame rule of deciſion was recommended and enforced. It was an action on a policy on the life of Sir *Simeon Stuart* Bart. from the 1ſt of *April* 1779 to the 1ſt of *April* 1780, and during the life of *Eliza Edgly Ewer*. This policy contained a warranty that Sir *Simeon* was about 57 years of age, *and in good health on the 11th of May* 1779, and that Mrs. *Ewer* was about 78 years of age. The defendant at the trial admitted, that Sir *Simeon* and Mrs. *Ewer* were of the reſpective ages mentioned in the warranty; that he died before the 1ſt of *April* 1780, and that ſhe was living. Two queſtions were in-

intended to have been made; 1ſt, As to the plaintiff's intereſt: 2d, On the warranty of health. The former was diſpoſed of by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that, although Sir *Simeon* was troubled with ſpaſms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was alſo proved by the broker, who effected the policy, that the underwriters were told, that Sir *Simeon* was ſubject to the gout. Dr. *Heberden* and other gentlemen of the faculty were examined, who proved that ſpaſms and convulſions were ſymptoms incident to the gout.

Lord *Mansfield*.—"The imperfection of language is ſuch that we have not words for every different idea; and the real intention of parties muſt be found out by the ſubject matter. By the preſent policy, the life is warranted, to ſome of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the ſeeds of a diſorder.* We are all born with the ſeeds of mortality in us. A man, ſubject to the gout, is a life capable of being inſured, if he has no ſickneſs at the time to make it an unequal contract." There was a verdict for the plaintiff."

In a former chapter we ſaw, that when the riſk is entire, and it is once begun, there ſhall be no apportionment or return of premium, though it ſhould ceaſe the very next day after it commenced. The ſame rule is applicable in every reſpect to the premium on life inſurances; for the contract is entire, and if the perſon whoſe life is inſured ſhould put an end to it the next day after the riſk commences, though the underwriter is diſcharged, there would be no return of premium. This has never been decided in any judicial determination expreſsly on the point, but it has frequently been declared to be the law upon the ſubject by the learned judges in the courſe of argument, when return of premium on marine inſurances was the point under diſcuſſion. This was particularly done in the caſe of *Tyrie* v. *Fletcher*, by Lord *Mansfield*, when delivering the judgment of the court. "There has been an inſtance put," ſaid his Lordſhip, "of a policy where the meaſure is by time, which ſeems to me

Vide ante, c. 19.

Cowp. 669.

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" to be very ſtrong and appoſite to the preſent caſe; and that is " an inſurance upon a man's life for twelve months. There " can be no doubt but the riſk there is conſtituted by the mea- " ſure of time, and depends entirely upon it: for the under- " writer would demand double the premium for *two* years, that " he would take to inſure the ſame life for one year only. In " ſuch policies, there is a general exception againſt ſuicide. If " the perſon puts an end to his own life the next day, or a month " after, or at any other period within the twelve months, there " never was an idea in any man's breaſt, that part of the pre- " mium ſhould be returned."

Doug. 789. Afterwards in the caſe of *Bermon* v. *Woodbridge*, Lord *Manſfield* laid down the ſame doctrine. "In an inſurance upon a " life, with the common exception of ſuicide, and the hands of " juſtice, if the party is executed, or commit ſuicide, in twenty- " four hours, there ſhall be no return."

From theſe opinions, which have been frequently repeated in other caſes, the law upon the ſubject of return of premium, as applicable to life inſurances, ſeems perfectly aſcertained: becauſe, except in the caſe of ſuicide or a public execution, the queſtion can never ariſe.

CHAPTER THE TWENTY-THIRD.

Of Insurance against Fire.

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AN insurance of this sort is a contract, by which the insurer, in consideration of the premium which he receives, undertakes to indemnify the insured, against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages, which mankind have derived from this species of contract, would be a waste of time; because they are obvious to every understanding. As little does it fall within the compass of my plan to enumerate the various offices that have been instituted for the purpose of insuring property against fire; or the rules and regulations, by which they are severally governed. Some of them have been instituted by royal charter; others by deed inrolled; and others give security upon land for the payment of losses. The rules, by which these societies are governed, are established by their own managers, and a copy given to every person at the time he insures; so that, by his acquiescence, he submits to their proposals, and is fully apprized of those rules upon the compliance or non-compliance with which he will or will not be entitled to an indemnity.

See 1 H. Blackst. 254.

The construction to be put upon those regulations has but seldom become the subject of judicial enquiry; few instances only having occurred in our researches upon this occasion. In the proposals of the *London* Assurance Company, and some of the other offices, there is a clause by which it is provided, that they do not hold themselves liable for any loss or damage by fire, happening by any invasion, foreign enemy, *or any military or usurped power* whatsoever. It became a question, what species of insurrection should be deemed a military or usurped power within the meaning of this proviso. It was held by the court of Common Pleas against the opinion of Mr. Justice *Gould*, that it could only mean to extend to houses set on fire by means of an invasion from abroad, or of an internal rebellion, when armies are employed to support it.

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Drinkwater v. the Corporation of the London Aſſurance, 2 Will. 363.

The caſe in which this queſtion aroſe, was an action of covenant againſt the defendants upon a policy of inſurance of a malting office of the plaintiff at *Norwich* from fire, in which policy there was a proviſo that the corporation ſhould not be liable in caſe the ſame ſhall be burnt by any invaſion by foreign enemies, or any military or uſurped power whatſoever, and that the defendants had not kept their covenants, to the plaintiff's damage. The defendants plead firſt the general iſſue, that they have not broke their covenants, and thereupon iſſue is joined. 2dly, They plead that it was burnt *by an uſurped power;* the plaintiff replies, that it was not burnt by *an uſurped power*, and thereupon iſſue is alſo joined. This cauſe was tried at *Norwich* aſſizes; a verdict was given for the plaintiff, and 469*l.* damages, ſubject to the opinion of the court, upon the following caſe, viz. That upon *Saturday* the 27th of *November*, a mob aroſe at *Norwich* upon account of the high price of proviſions, and ſpoiled and deſtroyed divers quantities of flour; thereupon the proclamation was read, and the mob diſperſed for that time. Afterwards another mob aroſe, and burnt down the malting office in the policy mentioned. The queſtion is, Whether the plaintiff is entitled to recover in this action? This caſe was twice argued at the bar, and the court took time to deliberate; after which, as the judges differed in opinion, they delivered their opinions *ſeriatim.*

Mr. Juſtice *Gould* was of opinion, that the malting office being burnt by the mob, who roſe to reduce the price of proviſions, the ſame was burnt by an *uſurped power*, within the true intent and meaning of the proviſo in the policy: to ſhew that it was an uſurped power for any perſon to aſſemble themſelves, to alter the laws, to ſet a price upon victuals, &c. he cited *Popham*, 122. where it is agreed by the juſtices, that to attempt ſuch a thing by force is felony, if not treaſon; and therefore judgment ought to be for the defendant.

Mr. Juſtice *Bathurſt.*—"The words, "*uſurped power*," in the proviſo, according to the true import thereof, and the meaning of the parties, can only mean an invaſion of the kingdom by foreign enemies to give laws and uſurp the government thereof, or an internal armed force in rebellion, aſſuming the power of government by making laws, and puniſhing, for not obeying thoſe laws. The plea alleges that the malting office was burnt

by an *uſurped power* unlawfully exerciſed, but does not charge *that* uſurped power as a rebellion; that a mob aroſe at *Norwich* on account of the price of victuals, and as ſoon as the proclamation was read, they diſperſed; therefore judgment ought to be for the plaintiff."

Mr. Juſtice *Clive*.—"The words muſt mean ſuch an uſurped power as amounts to high treaſon, which is ſettled by the 25th of *Edward* Third. The offence of the mob in the preſent caſe was a felonious riot, for which the offenders might have ſuffered; but it cannot be ſaid to be an uſurped power; therefore I am of opinion that judgment ſhould be given for the plaintiff."

Lord Chief Juſtice *Wilmot*.—"Upon the beſt conſideration I am able to give this caſe, I am of opinion, that the burning of the malting office, was not a burning by *an uſurped power* within the meaning of the proviſo. Policies of inſurance, like all other contracts, muſt be conſtrued according to the true intention of the parties. Although the counſel on one ſide ſaid, that policies ought to be conſtrued liberally; on the other ſide, that they ought to be conſtrued ſtrictly; in a doubtful caſe I think the turn of the ſcale ought to be given againſt the ſpeaker, becauſe he has not fully and clearly explained himſelf. The imperfection of language to expreſs our ideas is the occaſion that words have equivocal meanings; and it is often very uncertain what the parties to a contract in writing mean. When the ideas are ſimple, words expreſs them clearly; but when they are complex, difficulties often ariſe: and men differ much about the ideas intended to be conveyed by words: In the preſent caſe, what is the true idea conveyed to the mind by the words *uſurped power?* The rule to find it out is to conſider the words of the context, and to attend to the popular uſe of the words, according to *Horace*, *Arbitrium eſt, et jus, et norma loquendi.* My idea of the words, *burnt by an uſurped power*, from the context is, that they mean burnt or ſet on fire by occaſion of an invaſion from abroad, or of an internal rebellion, when armies are employed to ſupport it, when the laws are dormant and ſilent, and firing of towns are unavoidable; theſe are the outlines of the picture drawn by the idea, which theſe words convey to my mind. The time of the incorporation of this ſociety of the *Lon-*

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don Assurance Company, was soon after a rebellion in this kingdom, and it was not so romantic a thing to guard against fire by rebellion, as it might be now; the time, therefore, is an argument with me that this is the meaning of these words. Rebellious mobs may be also meant to be guarded against by the proviso, because this corporation commenced soon after the riot act; and if common mobs had been in their minds, they would have made use of the word *mob*. The words "*usurped power*," may have a great variety of meanings according to the subject matter where they are used, and it would be pedantic to define the words in their various meanings; but in the present case, they cannot mean the power used by a common mob. It has not been said, that if one, or fifty persons had wickedly set this house on fire, that it would be within the meaning of the words *usurped power*. It has been objected that here was an *usurped power* to reduce the price of victuals, but this is part of the power of the crown; and therefore it was an *usurped power*: but the king has no power to reduce the price of victuals. The difference between a rebellious mob, and a common mob, is, that the first is high treason; the latter a riot or a felony. Whether was this a common or a rebellious mob? The first time the mob rises, the magistrates read the proclamation, and the mob disperse; they hear the law, and immediately obey it. The next day another mob rises on the same account, and damages the houses of two bakers; thirty people in fifteen minutes put this army to flight, they were dispersed and heard of no more. Where are the *species belli* which Lord *Hale* describes? This mob wants an universality of purpose to destroy, to make it a rebellious mob, or high treason. 1 *Hale*'s P. C. 135. There must be an universality, a purpose to destroy *all* houses, *all* inclosures, *all* bawdy houses, &c. Here they fell upon two bakers and a miller, and the mob chastized these particulat persons to abate the price of provisions in a particular place: this does not amount to a rebellious mob. When the laws are executed with spirit, mobs are easily quelled; sometimes a courageous act done by a single person will quell and disperse a mob. And sometimes the wisdom of an individual will do the same, as is thus beautifully described by *Virgil*,

Ac veluti magno in populo cum sæpe coorta est
Seditio, sævitque animis ignobile vulgus,

Jamque

Jamque faces et saxa volant: furor arma ministrat.
Tum pietate gravem, ac meritis, si forte virum quem
Conspexere, silent, arrectisque auribus adstant:
Ille regit dictis animos, et pectora mulcet.

But amongſt armies, the laws are ſilenced, and the wiſdom or courage of an individual will ſignify nothing. Upon the whole, I am of opinion, that there muſt be judgment for the plaintiff:" and accordingly the *poſtea* was ordered to be delivered to the plaintiff, by three judges againſt one.

The Sun Fire Office has uſed words of a larger and more extenſive import than thoſe, which were the ſubject of diſcuſſion in the laſt caſe; for the proprietors of that company declare, that they will not pay any loſs or damage by fire, happening by any invaſion, foreign enemy, *civil commotion*, or any military or uſurped power whatſoever. A caſe has *unfortunately* ariſen, in which the meaning of theſe words, *civil commotion*, has been the ſubject of judicial enquiry.

Langdale v. Maſon and others, Sitt. at Guildhall, Mich. Vac. 1780.

An action was brought on a policy of inſurance to recover from the Sun Fire Office a ſatisfaction for damage done to the plaintiff's houſes and goods by the rioters, who, it is very well known, and hiſtory will inform poſterity, in *June* 1780, to the terror and diſmay of the inhabitants of *London*, traverſed that city for ſeveral days burning and deſtroying *Roman Catholic* chapels, public priſons, and the houſes of various individuals; the oſtenſible purpoſe of their aſſembling being to procure the repeal of a wiſe and humane law, (which had paſſed for ſome indulgencies to *Roman Catholics*,) and who were at laſt only diſperſed by military force. As the circumſtances of theſe riots were very recent, they were not minutely gone into at the trial. It was, however, ſufficiently proved, that the plaintiff, on account of his religion, (being a *Roman Catholic*), had been, amongſt others, ſelected as an object of the rage of the times, and that his houſes and effects were ſet on fire. The office defended this action, conſidering that they were protected by the article juſt recited, namely, "That they would not anſwer for "any loſs, occaſioned by an invaſion, foreign enemy, *civil com-*"*motion*, or any military or uſurped power whatever." This point was argued much at length by the counſel on both ſides.

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Lord *Mansfield*.—" Gentlemen of the jury, this is an action brought by the plaintiff againſt the defendants upon the policy of inſurance mentioned in the pleadings, for the value of property, which was conſumed by fire. Moſt undoubtedly, every man's leaning muſt be to the ſide of the plaintiff, in order to divide the loſs in ſo great a calamity. But that leaning muſt be governed by rules of law and juſtice: and the only queſtion that ariſes for your determination and that of the court, is ſingly upon the conſtruction of two words in the policy. It will be neceſſary, in order to inveſtigate this matter, to go into the hiſtory, which has been opened and explained to you, of other inſurance policies. In the year 1720, the *London* Aſſurance Company put into their policies all the words here uſed, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided againſt: when they burn houſes, or ſet fire to a town, that is alſo provided for. What is meant by military or uſurped power? Vide ſupra. They are ambiguous; and they ſeem to have been the ſubject of a queſtion and determination. They muſt mean rebellion, where the fire is made by authority: as in the year 1745, the rebels came to *Derby*, and if they had ordered any part of the town, or a ſingle houſe to be ſet on fire, that would have been by authority of a rebellion. That is the only diſtinction in the caſe—it muſt be by rebellion got to ſuch a head, as to be under authority. In the year 1726, ſome years after the *London* Aſſurance Company had done it, the Sun Fire office put in the exception; and in 1727, they put in other words: they do not keep to the form of the *London* Aſſurance: they do not ſay by invaſion from foreign enemies merely: they clearly provide againſt rebellion, determined rebellion, with generals who could give orders. Though this be ſo guarded, the Sun Fire Office did not think it anſwered their purpoſe; and therefore they took the words *civil commotion*. Not only uſing thoſe words, applicable to guard againſt a foreign enemy, againſt a rebellion, where there are officers and leaders, that can give authority and power; but they add other words, as general and untechnical as can poſſibly be uſed: *civil commotion*, not civil commotion that amounts to *high treaſon*. They avoid ſaying civil commotions that amount to felony: they avoid ſaying civil commotions that amount to *miſdemeanors*: but they uſe a general expreſſion " if the miſchief happens from a civil commotion," taking the largeſt and moſt general ſenſe of the words that the language will allow: they do

do not even say a *riot*. It may be a question in point of law, whether an assembly or multitude be a riot. In that case, they do not say committing a felony, but speak of fire occasioned by civil commotion. The single question is, Whether this has been a civil commotion? If there be a case to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured. But what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking from every man, who was the object of their resentment, that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as well as if no witnesses had been produced. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad street*, *St. Catharine's*, in *Colman-street*, at *Blackfriar's Bridge*, and at the plaintiffs. What is the object? *General destruction, general confusion. It certainly was meant to aim at the very vitals of the constitution.* It was not a private matter, under the colour of *popery* only, to destroy all Papists under a pretence or a cry of *No popery*. But the general object was *destruction* and *confusion*. The Fleet Prison was burnt down: Newgate was burnt down the night before. The King's Bench Prison is burnt, and all the prisoners set at liberty. The new Bridewell is burnt: the Bank attacked: consider the consequences, if they had succeeded in destroying the Bank of *England*. The Excise and Pay Offices in *Broad street* were threatened. Military resistance, and an extraordinary stretch were made and justified by necessity. There was a great deal of firing, many men were killed; and the houses of a vast number of Papists were burnt and destroyed. What is this but a *civil commotion?* No definition has been attempted to be given of what it is. It is said, that this is a civil commotion distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not put their expectation upon trying, whether they were guilty of high treason or not. There is no manner of doubt, that this was an insurrection for a grand purpose, to take from a set of men the protection of the law.

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law. That is levying war againſt the king; there is not any doubt of it. It is not put upon that, but on the ground of a civil commotion. It is not an occaſional riot, that would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; an inſurrection of the people for general purpoſes, though it may not amount to a rebellion, where there is an uſurped power. If you think it was ſuch an inſurrection of the people for the purpoſes of general miſchief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff." The jury, agreeably to the Chief Juſtice's direction, found for the defendants." (*a*).

See the printed propoſals of the different Fire Offices.

When a fire happens, and the party ſuſtains a loſs in conſequence of it, he is bound by the printed propoſals of moſt of the ſocieties, to give immediate notice thereof to the office in which he is inſured; and as ſoon as poſſible afterwards, or within a li-

Tarleton and others v. Stainforth, 5 Term. Rep. 695. This judgment was afterwards affirmed in the Exchequer-chamber, 3 Boſ. & Pull. 471.

(*a*) In a policy of inſurance againſt loſs by fire from half a year to half a year, the inſured agreed to pay the premium half-yearly "as long as the aſſurers ſhould agree to accept the ſame, *within* 15 *days after the expiration of the former half year*;" and it was alſo ſtipulated that no inſurance ſhould take place till the premium was actually paid; a loſs happened within 15 days after the end of one half year, but before the premium for the next was paid; and it was held that the aſſurers were not liable, though the aſſured tendered the premium before the end of the 15 days, but after the loſs.

The defendants in the above cauſe were members of a ſociety at Liverpool, for the inſurance of property from fire: but ſoon after the deciſion, the Royal Exchange Aſſurance Company, the Phœnix, and ſome other Inſurance Companies, gave notice that they did not mean to take advantage of the judgment ſo pronounced, but would hold themſelves liable for any loſs during the 15 days that were allowed for the payment of the inſurance upon annual policies, and all other policies of a longer period. But that policies for a ſhorter period than a year would ceaſe at ſix o'clock in the evening of the day mentioned in the policy. Still, in a ſubſequent caſe againſt the Sun Fire Office, which had advertized, the Court held, notwithſtanding this advertiſement, the aſſured having had notice, before the expiration of the year, to pay an increaſed premium for the year enſuing, otherwiſe they would not continue the inſurance, which the aſſured refuſed, that the office was not liable for a loſs which had happened within 15 days from the expiration of the year, for which the inſurance had been made, though the aſſured, after the loſs and before the 15 days expired, tendered the full premium, which had been demanded, the court being of opinion that the effect of the whole contract was only to give the aſſured an option to continue the aſſurance or not during 15 days after the expiration of the year, by paying the premium for the year enſuing, notwithſtanding an intervening loſs, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract upon the ſame terms.

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mitted time according to the regulations of ſome, to deliver in as particular an account of his loſs, or damage, as the nature of the caſe will admit; and make proof of the ſame, by his oath or affirmation, by books of accounts, or ſuch other vouchers as ſhall be required, or as ſhall be in exiſtence. It is alſo neceſſary that the inſured ſhould procure a certificate under the hands of the miniſters and churchwardens, together with ſome other reputable inhabitants of the pariſh, not concerned in ſuch loſs, importing, that they are well acquainted with the character and circumſtances of the ſufferer or ſufferers; and do know, or verily believe, that he, ſhe, or they, have really, and by misfortune ſuſtained by ſuch fire the loſs and damage therein mentioned (*a*). When any loſs is ſettled and adjuſted, the ſufferers are to receive immediate ſatisfaction, without any deduction.

In the *Lex Mercatoria* it is ſaid, that policies on houſes and lives admit of no *average*. That this is true of the latter cannot be denied, as we have already ſhewn in the preceding chapter; becauſe the payment of the whole ſum depends upon one ſingle event, which muſt *wholly* happen, or not at all. But that it cannot be true of inſurances againſt fire either of houſes or goods is equally clear; for houſes may be *partially* damaged, and goods may be *partially* deſtroyed. In which caſe, as inſurance is a contract of indemnity, the end of the contract is anſwered by putting the party in the ſame ſituation in which he was before the accident happened. But if he were to recover the whole ſum inſured, he would be in a better ſituation, which the law will not allow. Indeed, from the above quotation from the printed propoſals it is evident, that the offices conſider themſelves liable for partial loſſes. Nay, ſome of them, if not all, expreſsly undertake to allow all reaſonable charges, attending the removal of goods, in caſes of fire, and to pay the ſufferer's loſs, whether the goods are deſtroyed, loſt, or damaged by ſuch removal.

Beawes, 4th edit. p. 294.

Royal Exchange Aſſurance Company, Sun Fire Office, Phœnix Fire Office, &c.

Theſe policies of inſurance are not in their nature aſſignable, for they are only contracts to make good the loſs which the

Werſley v. Wood, 6 Term Rep. 701. 2 H. Black. 574 S. C. See alſo Routledge v. Burrell, 1 H. Black. 254. and Oldman v. Bewick, 2 H. Black. 577. n. (*a*).

(*a*) Since the three firſt editions of this work were publiſhed, it has been held by the Court of King's Bench, upon a writ of error from the Court of Common Pleas, that the printed propoſals, containing the above clauſe, are to be conſidered as part of the policy: and that the procuring ſuch a certificate is a condition *precedent* to the right of the aſſured to recover, and cannot be diſpenſed with, even though the miniſter and churchwardens wrongfully refuſe to grant the certificate.

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contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office (*a*). There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right, to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss. These points were decided in two causes, one before Lord Chancellor *King*, and the other before Lord *Hardwicke*.

Lynch and another v. Dalzell and others, 3 Brown's Parl. Cases, 497.

On the 28th of *July* 1721, one *Richard Ireland* took out from the Sun Fire Office, a policy of insurance, whereby it was witnessed, that whereas the said *Ireland* had agreed to pay, or cause to be paid to the said office, the sum of five shillings within fifteen days after every quarter-day, for the insurance of his house, being the *Angel* Inn at *Gravesend*, with his goods and merchandize as therein after expressed only, and not elsewhere, *viz.* the dwelling-house, not exceeding 400*l.* and for the goods in the same only, not exceeding 500*l.*; and for the stable only, not exceeding 100*l.* all then occupied by *James Peck*, from loss and damage by fire; and so long as the said *Richard Ireland* should duly pay or cause to be paid five shillings a quarter, as therein mentioned, the said society did bind themselves, their heirs, executors, administrators and assigns, to pay and satisfy the said *Ireland*, his executors, administrators, and assigns, within fifteen days after every quarter-day, in which he should suffer by fire, his loss not exceeding 1000*l.* according to the exact tenor of their printed proposals. The policy was subscribed the 28th of *July* 1721, by three of the trustees of the society. Some considerable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his son sole executor; who brought the policy to the office, and had an indorsement made thereon, that the same then belonged to him: and afterwards,

(*a*) But in marine insurances, the policy may be transferred. Delaney v. Stoddart, 1 Term Rep. 26.

namely,

namely, at or about *Chriſtmas* 1726, he, the ſaid *Anthony*, paid the office a premium of twenty ſhillings for one year's inſurance, from *Chriſtmas* 1726, to *Chriſtmas* 1727, as by an article in the propoſals, he was at liberty to do. On the 24th of *Auguſt* 1727, a fire happened at *Graveſend*, which, among others, deſtroyed the houſe mentioned in the policy; and ſome time afterwards the appellants applied to the office, and alleged, that they had purchaſed the houſe and goods of *Anthony Ireland*; that the ſame were their property at the time of the fire, and that they had an aſſignment of the policy made to them, at the ſame time that the houſe and goods were aſſigned; and they produced an affidavit made by the appellant *Roger Lynch*, in which he ſwore, that his loſs and damage by burning the ſaid houſe, amounted, at a moderate computation, to 500*l.* and upwards; and upon this affidavit was indorſed a certificate of the miniſter, churchwardens, and other inhabitants of *Graveſend*, that they verily believed, according to the beſt of their information, the appellants had ſuſtained a loſs of 500*l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loſs being ſuſtained by the appellants by the burning of any goods in the ſaid houſe; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had ſuffered any loſs. The appellants, however, inſiſted that the office ſhould pay them 1000*l.* for their loſs ſuſtained by the burning of the houſe and goods; and they accordingly filed a bill in Chancery, ſetting forth, that *Anthony Ireland* agreed to ſell and aſſign to the appellants the houſe, ſtables, and goods, and alſo, at the ſame time agreed to aſſign the policy; and that by indenture of the 24th of *June* 1727, for 250*l.* *Ireland* did aſſign to the appellants a leaſe he had of the houſe and ſtables for the reſidue of a term of 70 years, which commenced at *Midſummer*, 16 *Car.* 2.; but the goods, for which the appellants, as they alleged, were to pay 500*l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the ſame date, ſold the ſame to *Church* for his own uſe. The bill alſo ſtated, that by another writing of equal date, *Ireland* aſſigned the policy, and all money and benefit thereof, to the appellants. That although the bill of ſale of the houſhold goods was made to *Church*, yet, as the appellants paid the purchaſe-money for the ſame, *Church* aſſigned his bill of ſale to them, for ſecuring the money

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money they had paid for the goods; and afterwards, by another writing, releaſed to the appellants his benefit and intereſt in the policy. The bill prayed ſatisfaction.

The reſpondents put in their anſwer, in which they ſet forth the nature and method of the inſurances made by the office, and admitted the policy in queſtion, and the appellants' application for 1000*l.* loſs: but ſaid, that the affidavit produced was not agreeable to the propoſals; and that they had been informed and believed, that no aſſignment of the policy was made to the appellants, nor any aſſignment of goods made to them by *Church*, till after the fire. They inſiſted, that the policies, iſſued by the office, were not, in their nature, aſſignable, the ſame being only contracts to make good the loſs which the contracting party himſelf ſhould ſuſtain: and the policy in queſtion was firſt made to *Richard Ireland*, to pay *his* loſs, and was afterwards declared by indorſement to belong to *Anthony Ireland*; and that no other perſon was entitled to the benefit of it. The cauſe proceeded to iſſue, and witneſſes were examined on both ſides; and upon the appellants' own evidence it appeared, that the firſt diſcourſe between the appellants and Mr. *Ireland* about the policy was after the execution of the aſſignment of the houſe, and that the agreement (if there was any) about the policy was not at the time when the apppellants agreed to purchaſe *Ireland*'s term in the houſe. It appeared further, that the aſſignment of the policy, though bearing date *before*, was not made and executed till ſome time *after* the fire; ſo that the agreement for aſſigning the policy was a voluntary conceſſion of *Ireland* without any conſideration, and independent of the bargain for the houſe, and never made till after *Ireland*'s intereſt in the policy, as to the houſe, was determined, by his ſelling his intereſt in the thing inſured, and not carried into execution till the thing was loſt. As to the appellants' property in the goods, they proved an aſſignment from *Church* to them, as a ſecurity for 300*l.* but omitted, in their interrogatories, the material queſtion, *when this aſſignment was made*: though the reſpondents, by their anſwer, put the time plainly in iſſue, by inſiſting, that it was after the fire; and it did not appear that the appellants ever had any property in the goods. The reſpondents on their part proved, that the office did not inſure any perſons longer than they continued their property

perty in the thing insured; and that persons dealing with them might not be mistaken, such notice was usually given.

Lord Chancellor *King*.—"These policies are not insurances of the specific things mentioned to be insured; nor do such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment: but they are only special agreements with the persons insuring, against such loss or damage as they may sustain. The party insuring must have a property at the time of the loss, or he can sustain no loss; and consequently can be entitled to no satisfaction. There was no contract ever made between the office and the appellants for any insurance on the premises in question. Not only the express words, but the end and design of the contract with *Ireland* do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only; and the indorsement on the policy declared that right to his executor *Anthony Ireland* only. These policies are not in their nature assignable; nor is the interest in them ever intended to be transferrable from one to another, without the express consent of the office. The transactions in the present case, by changing their property backwards and forwards, and rendering it uncertain whose the true property is, raise a suspicion, and fully justify the caution of the office, in preventing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellants' claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened." His lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords; and after hearing counsel on both sides, it was ORDERED AND ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed.

A few years afterwards this case was cited with approbation by Lord *Hardwicke*, and relied upon by him as the ground of his opinion.

Anne

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The Sadlers' Company v. Baccock and others 2 Atk. 554.

Anne Strode, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of *April* 1734, became a proprietor of the Hand-in-hand Office, by insuring the sum of 400*l.* on the house, for seven years; and on paying twelve shillings down, and three pounds some time after, the Company agreed, "to raise and pay, out of the effects of the contribution "stock, the said sum of 400*l.* to her, and her executors, ad- "ministrators, and assigns, so often as the house shall be burnt "down within the said term, unless the directors should build "the said house, and put it in as good plight as before the fire; "and on the back of the policy it was indorsed, that if this po- "licy should be assigned, the assignment must be entered within "twenty-one days after the making thereof." Mrs. *Strode*'s lease expired at *Midsummer* 1740, the house was not burnt down till the *January* after 1740, and she made an assignment of the policy to the plaintiffs the 23d of *February* after 1740. The question is, Whether the plaintiffs, the assignees of Mrs. *Strode*, are entitled to the 400*l.* or to have the house built again; or whether the house being burnt down after Mrs. *Strode*'s property ceased in it, the Company are obliged to make good the loss to her assignee of the policy? The Company made an order, subsequent in time to Mrs. *Strode*'s policy in 1738. "That, whereas "policies expire upon the property of the insured's ceasing, if "there is no application of the insured to assign, or to have the "loss made up, then the person having the property may insure "the said house in the said office, notwithstanding the term for "which the house was originally insured is expired." There was evidence read for the plaintiffs to shew that they tendered the assignment to the defendants, to enter in their books, but they refused to accept of it.

Lord Chancellor *Hardwicke*.—"During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order, I was of opinion against them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. First, Whether this accident, which has happened, is such a loss, as obliges the defendants to make satisfaction to the plaintiffs? Secondly, Whether upon the terms of the original policy, the office is obliged to do it? Thirdly, which

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is rather conſequential of the former, Whether the plaintiffs are properly aſſignees of Mrs. *Strode* under this policy? If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction. Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee, her time expired at *Midſummer* 1740, the houſe was burnt down in *January* after, *within the ſeven years*; the plaintiffs, the Sadlers' Company, were ground landlords, and entitled to the reverſion of the term: upon the 23d of *February*, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only; ſo that it muſt be taken as a voluntary aſſignment, as it ſtands before me. It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover, as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened. And this introduces the ſecond and third queſtions. I am of opinion, it is neceſſary the party inſured ſhould have an intereſt or property at the time of inſuring, and at the time the fire happens. It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt. Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there *intereſt or no intereſt* is almoſt conſtantly inſerted, and if not inſerted (*a*) you cannot recover, unleſs you prove a property. By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand-in-Hand Office*, incorporated themſelves, the ſociety are to make ſatisfaction in caſe of any loſs by fire. To whom, or for what loſs, are they to make ſatisfaction? Why, to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring the thing, for there is no poſſibility of doing it, and therefore muſt mean inſuring the perſon from damage. By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens. It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly they meant to inſure upon the property of the inſured, becauſe nobody elſe can give them leave to lay

(*a*) This caſe was decided in the year 1743, previous to the paſſing of the ſtatute of 19 *Geo.* 2. ch 37.

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even a brick; for another perſon might fancy a houſe of a different kind. Thus it ſtands upon the original agreement. The next queſtion will be, whether the ſubſequent order, made by the defendants in 1738, has made any alteration. I am of opinion it has not, for it was made only to explain a particular caſe in the policy: for it might have been a queſtion, whether Mrs. *Strode* could have come, before the expiration of the term, to examine the books of the office, and therefore this order was made to give her ſuch a power. It has been ſtrongly objected that the ſociety could not make ſuch an order. I am very tender of ſaying, whether they can or not. Becauſe, on one hand, if might be hard to ſay, that as a ſociety they cannot make any order for the good of the ſociety: on the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the intereſt of the inſured. The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſignment before the loſs happened. Now with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit. It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been entitled to 400*l.* would any friend have adviſed her to make a preſent of it to the plaintiff? The caſe of *Lynch* v. *Dalzell*, in the Houſe of Lords, ſhews how ſtrict this court and that Houſe are, in the conſtruction of policies, to avoid frauds." The bill here muſt be diſmiſſed.

Vide ſupra.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the inſurance: and by the printed propoſals of the different ſocieties, it is expreſsly ſtipulated, that no inſurance ſhall take place, till the premium be actually paid by the inſured, his, her, or their agent or agents. This premium or conſideration money is in all the offices at the rate of two ſhillings *per cent.* for any ſum not exceeding 1000*l.* and two ſhillings and ſixpence from 1000*l.* upwards. But this muſt be underſtood to mean the premium upon *common inſurances* only: for upon hazardous trades, and wooden buildings, &c. the premium is proportioned to the riſk. Beſides this, by a late act of parliament, a duty of one ſhilling and ſixpence *per annum* is laid upon every hundred pounds of property inſured from fire. By a more modern ſtatute, an additional duty of ſixpence, for every ſum of one hundred pounds inſured, is impoſed, making

22 Geo. 3. c. 48. ſ. 1. & 2.

37 Geo. 3. c. 90. ſ. 19.

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in the whole two ſhillings *per cent.* The duty impoſed by the firſt act is not to extend to publick hoſpitals.

We have formerly ſeen, that whenever the riſk to be run was entire, there never was a return of premium, though the contract ſhould ceaſe and determine the next day after its commencement. This rule applies to inſurances againſt fire, which generally are made for one entire and connected portion of time, which cannot be ſevered: and therefore if the property inſured ſhould be deſtroyed by fire, ariſing from the act of a foreign enemy, the very day after the commencement of the policy though the underwriter would be diſcharged, yet there can be no apportionment or return of premium. Ante, c. 1.

By a ſtatute paſſed in the reign of his preſent Majeſty, the ſtamp duties on policies for inſuring houſes, furniture, goods, wares and merchandizes, or other property from loſs by fire, are repealed; and inſtead thereof it is provided, that for every policy of aſſurance from loſs by fire, where the ſum inſured ſhall not amount to 1000*l.* the ſum of three ſhillings; and where the ſum inſured ſhall amount to 1000*l.* or upwards, the ſum of ſix ſhillings ſhall be paid 37 Geo. 3. c. 90. ſ. 23. Sect. 24.

As the pureſt equity and good faith are eſſentially requiſite, as has been already ſhewn, to render the contract effectual when it relates to marine inſurances; ſo it need hardly be obſerved, that it is no leſs eſſential to the validity of the policy againſt fire: becauſe in the latter, as well as in the former, the inſurer, from the nature of the thing, is obliged, in a great meaſure, to rely upon the integrity and honeſty of the inſured, as to the repreſentation of the value and quantity of the property, which is the object of the inſurance. Vide ante, c. 9.

ADDENDA.

The following Case may properly be introduced after the Cases on Insurances on Freight, p. 46. *et seq.*

Forbes and another v. Cowie, Sittings after Mich. T. 1808.

INSURANCE on the ship *Chiswick* " at and from any port or " ports in *Hayti* to *Liverpool*, or the vessel's port or ports of " discharge in the United Kingdom, with leave to chase, &c." The insurance was declared to be " on freight valued at " and the loss was stated to be by perils of the sea. The following facts were admitted: That the plaintiffs being owners of the *Chiswick* in the declaration mentioned, procured a licence for her to sail from *Liverpool* to *St. Domingo* to trade there and to bring home a return cargo of the produce of that country.

That the *Chiswick* sailed from *Liverpool* to *St. Domingo*, called *Hayti*, and arrived at *St. Domingo* on the 4th of *July* 1808, with a cargo of goods belonging to the plaintiffs, to be there bartered for other goods to be brought back to *Liverpool* in the said ship.

That part of the goods carried from *Liverpool* were bartered and exchanged for 55 bales of cotton of the produce of *St. Domigo*, which were put on board the ship for her voyage home.

The remaining part of her outward cargo being still on board would, in all probability, in a few days have been exchanged for other goods to be put on board in like manner, but for the loss hereinafter-mentioned.

The ship with such remaining part of her outward cargo, and the said 55 bales of cotton on board being in good safety at *St. Domingo* on the 15th day of *July* 1808, was by the perils of the seas lost. The defendant has settled with the plaintiffs for the loss of the freight of the said 55 bales of cotton, without prejudice to the plaintiffs' claim for a further loss on freight if they are entitled to it.

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The remaining part of the outward cargo, though damaged, was ſaved, and in 12 days after the loſs of the ſhip was exchanged for 250 tons of coffee and 100 tons of wood, the produce of *St. Domingo*, the freight of which would have been of a larger value than the ſum inſured on freight if the ſhip had not been loſt.

The plaintiffs were intereſted in the ſaid freight in the declaration mentioned.

This action is brought to recover a total loſs on the freight home.

This caſe was at the bar compared to the caſe of *Horncaſtle* v. *Suart*, (*ante*, p. 48.) but

Lord *Ellenborough* was clearly of opinion that as there was no charterparty, nor the policy valued, this caſe was exactly like that of *Tonge* v. *Watts*, (*ante*, p. 46.) and the plaintiffs were nonſuited.

In the following term a motion was made to ſet aſide this nonſuit, but even a rule to ſhew cauſe was refuſed by the whole Court.

The two following Caſes may properly be adverted to after the Caſe of *Noble* v. *Kennoway*, ante, p. 58.

Ougier v. Jennings, Sitt. in C. P. after Eaſt. 1800.

THIS was an action on a policy of inſurance on fiſh, to commmence from the loading thereof on board the ſhip *Dutcheſs of Gordon*, at and from *Newfoundland* to a port in *Portugal*, warranted to depart with a *Portugal* convoy. In one count the loſs was averred to be by capture, in another by perils of the ſea. The ſhip proceeded from *Liſbon* to *Newfoundland*, where ſhe arrived in *July*, and then proceeded on an intermediate voyage to *Sidney* in *Nova Scotia*, in *Auguſt*, and returned with a cargo of coals on the 30th *September*. That about the 1ſt *October* the *Caſtor* frigate ſailed with a convoy from *Newfoundland* for *Portugal*; but there was not a cargo of fiſh ready, or in a fit ſtate for the ſhip to ſail by the firſt convoy. That

the ship sailed perfectly seaworthy on the 21st *November* for *Oporto*; was captured, recaptured, and afterwards totally wrecked. It was proved that the vessel was not by means of the intermediate voyage in any respect rendered less capable of performing her voyage to *Portugal*; and that she had not taken in any of her homeward cargo of fish before her return from the intermediate voyage. Several witnesses conversant with the *Newfoundland* trade swore to the constant usage of ships taking these intermediate trips while their cargoes are getting ready, and that these voyages are absolutely necessary to be taken for the support of the colony; that there is a great supply of coals from *Sidney*, and of bread and flour from *Quebec*, to which latter place several ships went that season.

Lord *Eldon*, then Chief Justice of the Court of Common Pleas, told the jury, that he thought the practice of the trade in this case was as fitly to be received in evidence as in other cases in which such proof had been admitted Then his Lord-
Dougl. 510. ship quoted the case of *Noble* v. *Kennoway*, (*ante*, p. 58.) and said, no doubt the policy here is meant to protect the first cargo which shall be laden after the ship's arrival; but the underwriter must refer himself to the usage of the trade; he is bound to know it. Is there such a usage here? If, indeed, the evidence were to lead to this, that the ship may make intermediate voyages for several years, that would be too dangerous to give effect to such a usage. But if a trader *bonâ fide* sends the ships in their turn on an intermediate voyage, that seems reasonable: *studiously sending them out of turn* would be a deviation. The next question then is, whether this ship has been employed otherwise than as the usage warrants. If you think the usage does exist; if you think it reasonable; and if you think this ship acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff, which they did accordingly.

Vallance v. Dewar, Sitt. after Mich. 1808

So in a subsequent case on an insurance, dated 26th *August* 1807, on ship *Courier*, freight and cargo, at and from any port or ports in *Newfoundland* to one port of discharge in *Portugal*, or to any port or ports in the United Kingdom. The facts admitted were, that the goods were loaded at *Cape Broyle* in *Newfoundland*, between the 13th *October* and the 14th *December* 1807; that she received sailing instructions from the convoy,

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and ſailed for *Dartmouth*, and was afterwards totally loſt in a gale of wind. That a policy of inſurance on the ſhip *Courier* had been underwritten on the 29th *June* 1807; and that at the time the defendant underwote the policy in queſtion, he was not informed by the broker, or by any other perſon that the *Courier* was intended to be employed *in banking* on the coaſt of *Newfoundland*, ſubſequent to the date of the policy in queſtion; or that the ſaid policy of the 29th *June* 1807, had been previouſly effected on the ſaid ſhip to cover her banking voyage to the 31ſt *October* 1807; and that the ſaid ſhip *Courier* was *employed banking*, from whence ſhe returned to *Cape Broyle* on 13th *October* 1807. The plaintiff, in order to prove that it was not neceſſary to communicate this banking voyage, called ſeveral witneſſes to prove the general uſage that *Newfoundland* ſhips almoſt always engaged either in banking or in intermediate voyages till the fiſh was ready.

Lord *Ellenborough* ſaid,—"The aſſured are certainly bound to communicate what the underwriters do not know; and what the aſſured do, but what is common between them both, need not. The queſtion then is, whether the banking voyage is uſually interpoſed, becauſe if ſo, the fact need not be divulged. If theſe ſeparate voyages and inſurances are notorious in the trade, then the common words "*at and from*" muſt mean "at the place *when preparing for the voyage home*, and then *from*." If there are exceptions to this general uſage, the underwriter ought to have aſked, whether in this caſe the exception exiſted." Verdict for the plaintiff.

The two following Caſes will tend to illuſtrate the doctrine contained in the caſe of *Airey* v. *Bland*. Ante, p. 34.

THE firſt of them was an action of aſſumpſit for money had and received. The principal item in diſpute between the parties was a ſum paid by the plaintiff to the defendant under the following circumſtances: Edgar v. Bumſtead. 1 Campbell 411.

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (among others) by one *Lomas*. A loss happened; whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this, *Lomas* had become insolvent, without the plaintiff being aware of the fact; and it was now contended, that he had a right to recover the sum he had paid to the defendant in respect of *Lomas*'s subscription, as money paid under a mistake of the fact. But Lord *Ellenborough* held, that on account of the well known course of dealing between the insurance broker, the merchant and the underwriter, the money could not, under these circumstances, be recovered back from the assured.

It has also lately been decided, that in an action by the assured against an underwriter to recover the premium, the policy subscribed by the defendant is conclusive evidence that he has received the premium. This was held in an action for money had and received, tried at *Guildhall*. The defendant had underwritten a policy of insurance effected by one *Reid*, an insurance broker, on account of the plaintiff, upon goods by ship or ships, at and from *Berbice* to *Great Britain*. This action was brought to recover back the premium, on the ground that the goods had never been shipped.

Da'zell v. Mair. 1 Campbell 532.

The plaintiff gave in evidence the policy signed by the defendant, which contained the usual acknowledgment on the part of the underwriters, "*confessing ourselves paid the consideration due unto us for this assurance by the assured*," &c. It appeared, however, that no money had really been paid in respect of the insurance in question. The plaintiff being the holder of a bill of exchange accepted by *Reid*, which was not paid when due, the latter proposed by way of satisfaction to get policies of insurance underwritten for him. This policy was effected in consequence; and *Reid* having a running account with the defendant, had not paid him any part of the premium at the commencement of this action.

It was contended, that under these circumstances the action would not lie, as no money had been received by the defendan either

either from the plaintiff or *Reid*, or paid by the plaintiff either to *Reid* or the defendant.

Lord *Ellenborough*.—The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a ſum of money from the broker, and accredits him with his principal to that amount, he ſhall not afterwards, as between himſelf and the principal, be allowed to ſay that the broker never paid him. I ſhould completely knock up the inſurance buſineſs, if I were to allow this acknowledgment to be impeached. It is well known that there are running accounts kept between the inſurance broker and the underwriter; and Lord *Kenyon* held that the former, before paying premiums to the latter, might maintain an action againſt the aſſured to recover the amount of them as for money paid.

Mr. *Campbell* adds in a note upon the laſt caſe, that he had not been able to find any deciſion of Lord *Kenyon*'s upon this point: but that learned Reporter refers to the caſe of *Airey* v. *Bland*, and then adds a very acute and ſenſible obſervation, "that "the object of the formal acknowledgment of the receipt of "the premium inſerted in the policy is probably to preclude the "neceſſity of proving it when a loſs happens, and to prevent the "underwriters from objecting, that there was a want of conſi- "deration for their promiſe, in caſe the broker has not paid "them. The receipt is no bar to an action for the premium "by the underwriter againſt the broker; and the diſtinction "ſeems to be this, that as between theſe parties it is no evidence "at all, but that as between the underwriters and the aſſured "it is concluſive. It follows as a conſequence from this deci- "ſion, that an action cannot be maintained for premiums of "inſurance by the underwriters againſt the aſſured, which has "hitherto been *vexata queſtio*." p. 534.

The three following Caſes are of importance to ſhew that an *American* ſubject ſhall not claim from an *Engliſh* under- writer any indemnity from the act of detention or embargo by his own government: and therefore ſo far extend, but do

not, as I conceive, alter the principle contended for in Chapther the Fourth, upon the doctrine of Abandonment. For although the words of the policy are general, "all reſtraints "and detainments of all kings, princes, and people, &c." yet they muſt ever be conſidered with reference to the benefit of the ſtate in which the contracting party lives, and to the policy which it may think proper to adopt. I have not thought it neceſſary to ſtate the facts of each caſe; becauſe one judgment was pronounced upon the whole, and the Lord Chief Juſtice (Lord *Ellenborough*) in pronouncing that judgment ſtated all the material facts upon which the judgment of the court was founded.

Lord *Ellenborough*, C. J.

Conway v. Gray. Conway v. Forbes, Maury v. Shedden. Hil. Term 49 Geo. III.

Theſe were caſes in each of which the plaintiffs claimed a right to abandon in conſequence of the *American* embargo in *December* 1807, and the main queſtion in each was the ſame. The firſt was upon a policy on goods on board the *Swift*, at and from *New York* to *Liverpool*, and the intereſt was averred in one count to be in the plaintiffs jointly; in another, in one of them only, i. e. *Thomas Davidſon*; and in a third, in one *John Townſend*. *Townſend* was a reſident citizen of *America*, and had conſigned the goods to the plaintiffs for ſale, on his (*Townſend*'s) account and riſk. The plaintiffs, *Conway* and *Davidſon*, are *Britiſh* ſubjects, carrying on buſineſs as merchants in partnerſhip at *Liverpool*; *Conway* reſiding at *Liverpool*, and *Davidſon* having for ſome time paſt reſided in *America*. The invoice and bill of lading are dated the 29th of *December* 1807. Before the ſhipment *Davidſon* had agreed to grant *Townſend* an anticipation of 6000*l.* on account of theſe and certain other goods, by bills on the plaintiffs: and accordingly, on the 7th of *November* 1807, bills to that amount were drawn by *Townſend* on the plaintiffs, and theſe bills were accepted by *Davidſon*, the partner of *Conway*, in *America*, within a day or two after their date, and were paid when due by the plaintiffs. The plaintiffs have been reimburſed part of the amount of theſe bills; but 2122*l.* 18*s.* 3*d.* is ſtill due to them upon that tranſaction. This policy was ſubſcribed on the 25th of *January* 1808; and the plaintiffs charged the premiums to *Townſend*'s account. On the 22d of *December* 1807, an act was paſſed by the *American* government for laying

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an embargo on all ſhips and veſſels in their ports. By this embargo this veſſel was detained; and as ſoon as they heard of the detention, the plaintiffs abandoned. It is ſtated indeed, in the caſe of *Conway* v. *Gray*, that the plaintiffs abandoned the veſſel and nothing is ſaid as to the goods; and as the inſurance was on the goods, an abandonment of the veſſel could give no claim; but we preſume that this is a miſtake, and that the goods were abandoned.

In the ſecond cauſe (*Conway* and another v. *Forbes*) the facts are nearly ſimilar. The policy was upon goods in the ſame ſhip; thoſe goods were ſhipped by *Alexander Macomb*, a reſident *American* citizen: they were conſigned to the plaintiffs, on *Macomb*'s account and riſk. *Davidſon* agreed to grant *Macomb* an anticipation of 7500*l.* by bills on the plaintiffs, accepted by *Davidſon* in *America*; and the plaintiffs have paid 2500*l.* upon thoſe bills. The bill of lading and invoice are dated at *New York*, the 24th *December* 1807, and the policy is dated the 25th *January* 1808. The plaintiffs charged the premium to *Macomb*.

In *Maury* v. *Shedden* the policy was upon ſhip valued at 6000*l.* and *James Maury* Eſquire, the *American* conſul, who was then reſident at *Liverpool*, was the ſole owner. Mr. *Maury* is a native of *America*, but came to reſide at *Liverpool* as a merchant in 1786; and from the year 1790 has been the *American* conſul there. The ſhip is an *American* veſſel, and regiſtered there under a privilege allowed by the navigation laws of *America* to their conſuls.

Upon each of theſe caſes this queſtion ariſes; 1ſt. Whether the *American* embargo will warrant an abandonment by or on behalf of an *American* ſubject: and if not; then a ſecond queſtion ariſes in the firſt and ſecond cauſes; whether *Conway* and *Davidſon*, as conſignees of the goods, being in advance to the conſignors and under acceptances for them, (in one caſe the plaintiffs being in advance and alſo under acceptances; in the other caſe againſt *Forbes*, the plaintiffs were only under acceptances,) have a right to apply the policies to their own intereſts, as ſuch, and to abandon on that account. As to the firſt; in all queſtions ariſing between the ſubjects of different ſtates,

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each is a party to the public authoritative acts of his own government; and on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject in a *British* court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. This seems to be established by *Touteng* v. *Hubbard*, 3 Bos. and Pull. 291. That was an action by the owners of a *Swedish* vessel against a *British* subject, for not supplying the vessel with a cargo at *Saint Michael's*. The sailing of the ship from this kingdom had been prevented a considerable time, and until it was too late for the fruit season at *Saint Michael's*, by an embargo here upon *Swedish* vessels. That embargo was in the nature of reprisals for what were considered acts of aggression by the *Swedish* government. The court was of opinion, that if that had not been the case of a *Swede* against a *British* subject, the plaintiff would have been entitled to recover: but as the embargo was produced by acts of the *Swedish* government, and every *Swede* was to be considered a party to those acts, it was in effect the plaintiff's own fault that his vessel was detained; and then loss which resulted from it was one he ought himself to bear. He was bound to proceed with all convenient speed: the acts of his government led to his being prevented; he was considered as a party to those acts; and was, therefore, looked upon as having failed in his part of the contract, viz. proceeding with all convenient speed. In the cases now before the court, the foundation of the abandonment is an act of the *American* government. Every *American* subject is to be considered as a party to that act: and has, virtually, the concurrence and consent of all, and amongst the rest, the concurrence and consent of the assureds in these cases: the assureds, therefore, have joined in a resolution, that the ships in question shall not be allowed to sail, but shall remain in their ports: and is it possible for them afterwards to make their not sailing the foundation of an action? The party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done. Where the insured and the insurer are both subjects of the same state, the question will stand upon very different grounds of consideration.

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As to the ſecond queſtion, whether the conſignees have not a right to apply the policies to their own intereſts, and to abandon on that accont; we are of opinion that they have not. It might perhaps be difficult to make out that they had ſuch an intereſt as was capable of abandonment, becauſe they were to have no control over the goods but upon their arrival in *England*; and it may alſo be very queſtionable whether any policy, which is effected clearly to cover the intereſt of the conſignor, can be applied to protect the intereſt of the conſignee. But the particular ground of our deciſion is this, that where a policy is effected on behalf of the conſignor, and the conduct of the conſignor, or of the ſtate to which he belongs, has taken away from him the right of inforcing it directly and effectually for his own benefit; the conſignee is not at liberty to apply it to his intereſt, and inforce payment as though it had been made on his account. We do not ſay a conſignee may not inſure, we only ſay that he is ſo far identified in intereſt and right with his conſignor, as not to be able to apply with effect to his own intereſt, which is derived out of that of the conſignor, an inſurance which was effected in order to cover the intereſt of the conſignor, but which, upon the principle already ſtated, cannot be available for that purpoſe. The underwriter has an implied pledge from the aſſured, that he will do no act to obſtruct the voyage, and when that pledge is broken by the perſon on whoſe account the inſurance was made, can another perſon, who has paid no premium out of his own pocket, ſtep in to take the benefit of that inſurance, merely becauſe his dealings with the aſſured would have enabled him to have inſured in his own name? There is no caſe which decides that he can, and it would be groſs injuſtice that he ſhould. *Wolffe* v. *Horncaſtle*, 1 Boſ. & Pull. 316. which was cited in the argument, goes no ſuch length. In that caſe the plaintiffs had effected a policy to cover the intereſt of one *Lund* in a cargo, and had advanced 300*l.* on the credit of that cargo. The main queſtion was, whether the policy were ſo effected as to cover *Lund*'s intereſt, and if it were not, then it was contended that it might be applied to cover that intereſt which the plaintiffs had acquired by their advance of the 300*l.* The Court were unanimous that the policy was ſo effected as to cover *Lund*'s intereſt; ſo that a deciſion upon the other point was unneceſſary: but they intimated a clear opinion upon that point, that the plain-

tiffs had an insurable interest; and they seem to have thought the policy might have been applied to it, if it could not have been applied to *Lund*'s. How does that case however bear upon this? *Lund* had done no act to forfeit his right upon the policy, and if he could not have recovered, would have been merely because the policy was not effected so as to be capable of covering his interest: the only objection made to *Lund*'s interest being that *Wolffe* had made the insurance without orders or authority from *Lund*; and then if it could not apply to the 300*l.* the plaintiffs had advanced, it would have been applicable to nothing. Here the policies were effected so as to be capable of covering the consignor's interest, and for the express purpose of doing so: they are applicable to that, and the consignors have forfeited their rights by the act of their government. The case of *Wolffe* v. *Horncastle*, therefore, concludes nothing in favour of these plaintiffs. In truth in that case had the plaintiffs been allowed to recover upon their own interest, on account of the advance they had made, it would in substance have been suffering *Lund* to recover *pro tanto*; because then they could not have resorted to him for reimbursement: and in these cases, if *Conway* and *Davidson* were allowed to recover in respect of their advances, it would in substance be suffering the *American* consignors to recover *pro tanto*, because it would wipe off the claim which *Conway* and *Davidson* have upon them. In *Wolffe* v. *Horncastle* it would have been in furtherance of justice, because *Lund* had done nothing to forfeit his claim upon the policy: in this case it would be against justice, because these *American* consignors have done that by which their claim is precluded. For these reasons we are of opinion, that in each of these cases the postea must be delivered to the defendant."

Baring v. Day, 8 East, 57. ante, p. 183.

In consequence of what fell from the Court in the case of *Baring* v. *Day*, in an act soon after passed "*For preventing the various Frauds and Depredations committed on Merchants, Ship Owners and Underwriters, by Boatmen and others, within the Jurisdiction of the* Cinque Ports; *and also for remedying certain Defects relative to the Adjustment of Salvage under a Statute made in the 12th of Queen* Anne;" there are two clauses introduced affecting the whole kingdom, (except the *Cinque Ports*, which are regulated by the prior provisions of the act,) and

and which are evidently aimed at the deficiencies discovered by the Court in the former statute. "And whereas it is expedient that the like means of conclusively adjusting and recovering the *quantum* of the monies or gratuities to be paid to the several persons acting or employed in the salvage of any ship, vessel, or goods, should subsist and be by law applicable in cases where the salvors shall have acted under and by the mere employment and authority of the commander or other superior officer, mariners or owners of any ship or vessel in distress, as now by law provided for adjusting the *quantum* of such monies or gratuities which shall have become due in cases where application shall have been first made to officers of the customs, or other officer or officers in that behalf made and appointed in and by a certain statute made in the twelfth year of the reign of our late sovereign Queen *Anne*, intituled, &c. be it therefore enacted and declared, by the authority aforesaid, that from and after the passing of this act, all and every means which in virtue of the statute last-mentioned subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the *quantum* of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship, vessel, or goods, in cases where application shall have been first made pursuant to that statute to officers of the customs, or other the officer or officers therein in that behalf mentioned, and assistance shall have been thereupon rendered and had in pursuance of the provisions of that statute, shall be by law applicable and available in like manner to all intents and purposes, and in cases where the salvors shall have acted under by the mere employment and authority of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any authority or assistance derived from any officers of the customs, or other the officer or officers in the said statute in that behalf mentioned; and that upon payment or tender and refusal of the *quantum* of monies or gratuities to be paid to the several persons, who shall have acted or been employed in such salvage, or in case such payment or tender cannot be made, or security being given for the due payment thereof to the satisfaction of the justices, who shall have adjusted such *quantum* of gratuities, it shall not be lawful for any officer of the customs, or other person or persons having the possession or custody of such ship, 43 Geo. 3. ch. 130, s. 21.

veſſel, or goods, any longer to retain the poſſeſſion or cuſtody of the ſame, or any part thereof by reaſon or pretence of any claim or right to a compenſation or gratuity for ſuch ſalvage as aforeſaid, or for having acted or been employed therein.

Sect. 22. Provided always, that in caſes where the ſalvors ſhall have acted without application made to, or without any authority derived from any officer of the cuſtoms, or other officer in the ſaid act mentioned, and the commander or other ſuperior officer, mariners, or owners of ſuch ſhip or veſſel ſo ſaved as aforeſaid, or the merchant or other perſon whoſe goods ſhall be ſo ſaved, or their agents as aforeſaid ſhall diſagree with ſuch ſalvors touching the *quantum* of the monies or gratuity deſerved by any perſon ſo employed as aforeſaid, it ſhall be lawful for the commander of ſuch ſhip or veſſel ſo ſaved, or the owner of the goods, or merchant intereſted therein, or their agents, and for ſuch ſalvors as aforeſaid, to nominate three of the neighbouring juſtices of the peace to adjuſt the *quantum* of the monies or gratuities to be paid to ſuch ſalvors, and in caſe the parties ſhall not agree in ſuch nomination, that then, on the application of any of the parties to any one neighbouring juſtice of the peace, the juſtice ſo applied to ſhall nominate two other neighbouring juſtices of the peace; and ſuch three neighbouring juſtices ſhall and may thereupon, and they are hereby authorized and required to adjuſt the *quantum* of the monies and gratuities to be paid to all and each of ſuch ſalvors who ſhall diſagree with ſuch maſter, commanding officer, merchant, or owners, or their agents as aforeſaid, touching the *quantum* of monies or the gratuity to be paid to him or them reſpectively, for his or their having been employed and acted in ſuch ſalvage as aforeſaid.

The following Caſe ſeems too important on the Subject of *Repreſentation*, at the Time of ſigning the Ship, to be omitted in this Place.

Edwards, v. Footner, 1 Campbell, 550.

It was an action on a policy of inſurance on goods in the *Fanny*, from *London* to *Hayti*.

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The ſhip was captured by a *French* privateer with the goods on board, and the queſtion was, whether the underwriters were diſcharged by a repreſentation concerning her equipment.

It appeared, that about a week before the policy was ſigned the names of the underwriters were put down upon a ſlip when the broker ſtated to the defendant, "That the *Fanny* was to ſail "with the *Hopewell* and *Young Roſcius*, both armed ſhips, and "that ſhe was herſelf to carry *ten guns and twenty-five men.*" There was no evidence of any converſation upon the ſubject having paſſed between the parties either when the policy was ſigned or in the intervening period. In fact, the *Fanny* ſailed by herſelf, and carried only *eight guns and ſeventeen men.* It was contended, that the ſhip was ſufficiently equipt to be ſeaworthy, and that what was ſaid, when the defendant's name was put upon the ſlip, could not be conſidered as a repreſentation which the aſſured were bound to comply with, as the ſlip was no evidence of the contract, and the Court could only look to what took place when the policy was ſubſcribed. This very point had been lately decided in *Dawſon* v. *Atty*, 7 Eaſt, 367. where it was held, that although the broker, when the ſlip was ſubſcribed, had ſaid that the ſhip was an *American*, yet, as he had not repreſented her to be of any particular country at the time when the policy was ſubſcribed, ſhe did not require to be documented as an *American*, and, although ſhe was captured for want of a certificate required by a treaty between the government of the captors and the United States of *America*, the owner of the goods recovered againſt the underwriters. Ante 473.

Lord *Ellenborough*.—"If a repreſentation is once made, it is to be conſidered as binding, unleſs there is evidence of its being afterwards altered or withdrawn. In the caſe cited the veſſel was ſtated to be an *American* when the ſlip was made out; but when the policy came to be ſigned, the broker ſaid generally, "That it was an inſurance on goods in the *Hermon*," without deſcribing her as of any particular country. There the firſt converſation was qualified and controuled by what followed But here there is no evidence of any converſation upon this ſubject between the parties ſubſequently to the ſtatement that the ſhip was to carry 10 guns and 25 men; and this having

taken place when the insurance was talked of, and the terms of it agreed upon, it must be referred to the policy, and treated as a representation, which required to be substantially complied with on the part of the assured."

It had for some time been a question at the bar, where the port, to which the vessel was insured, had fallen into the enemy's hands before the arrival of the ship, whether the ship still continued under the protection of the policy to a place of safety. The better opinion at the bar was, that the vessel was not protected, for that the underwriter might justly say, I contracted to insure your ship to *A.* but not to *B.* This point came directly before the Court in the following case:

Parkin v. Tunno, Easter T. 49 G. 3

The insurance was on goods on board the ship *Laurel, at and from Bristol to Monte Video, and any other port or ports in the River Plate, in possession of the English;* and the plaintiff declared on a loss by perils of the sea. It appeared at the trial at *Guildhall*, before Lord *Ellenborough*, that when the vessel appeared in the *River Plate*, *Monte Video*, and every other port in that river, except *Maldonado*, was in the possession of the enemy, (there being then war between *Great Britain* and *Spain*,) and the *English* commander of *Maldonado* ordered the vessel away imediately upon her arrival, in consequence of the urgency of public affairs whereupon the vessel, being short of water and in want of repairs, bore away directly for *Rio Janeiro* in the *Brazils*, being the neareſt friendly port of safety, and in her course thither she met with a peril of the sea, to which the injury sustained by the goods might fairly be attributed in the absence of any direct evidence of a prior cause of damage. It was therefore insisted upon at the trial, and now again in moving to set aside the nonsuit, that the ship not being able, under these circumstances, to proceed to any port in the *River Plate*, in the possession of an enemy, and being ordered away from *Maldonado*, immediately after her arrival there, by the authority of the *British* commander, whom the master was bound to obey, the policy continued to cover her to the neareſt port of safety, to which she was under the necessity of repairing. But

Lord *Ellenborough*, at the trial, and now again with the concurrence of the Court, was of opinion, that the policy containing

ing a contract for a ſpecific voyage could not be extended by implication to cover the ſhip in her voyage to *Rio Janeiro*, notwithſtanding the circumſtance which had occurred to induce the neceſſity of it. The rule was refuſed.

I know that the very learned gentleman, who brought this before the Court, was deſirous to have their opinion on it, as his own ſentiments were ſimilar to thoſe pronounced by Lord *Ellenborough*; but a deciſion reſpecting which became extremely material, as ſimilar caſes muſt frequently occur in practice.

An action was brought on a policy of inſurance on the *American* ſhip, the *Maryland Mary*, at and from *Gibraltar* to a market, with leave to call and land goods at two or more ports in the *Mediterranean*. The ſhip having landed ſome goods at *Malta*, proceeded from thence on the 17th of *May* 1807, with the reſt of her cargo for *Smyrna*, but was the ſame day captured by a *Ruſſian* privateer, and being afterwards carried into *Corfu* was there condemned as lawful prize.

Donaldſon v. Thomſon, 1 Campbell, 429.

The defence ſet up by the underwriters was, that this *American* ſhip, by ſailing for *Smyrna*, had violated the laws of neutrality; as that port was then blockaded by the *Ruſſians*. However the only evidence adduced to ſhew that the captain knew of the blockade before he left *Malta*, was the ſentence of condemnation, in which this fact was poſitively averred. Upon the validity of this ſentence, therefore, the cauſe intirely depended. It was pronounced by a prize commiſſion which ſat in *Corfu* in *July* 1807, by the authority of the Emperor of *Ruſſia*.

The plaintiff's counſel contended, on the authority of the caſe of the *Flad Oyen*, 1 Rob. Rep. 144. that the ſuppoſed court could have no legitimate juriſdiction where it ſat, and that its ſentence was a nullity. *Corfu* was one of the iſlands which formed the *Ionian* republic, an independent government, recognized by the peace of *Amiens*, and which continued to preſerve its neutrality amidſt the ſtruggles of the ſurrounding ſtates. A belligerent, therefore, could have no right to hold a prize court there conſiſtently with the principles of the law of nations.

On the other ſide it was admitted, that if *Corfu* was to be conſidered as being at the time of the condemnation an independent neutral ſtate, the ſentence could not be ſupported. But they undertook to prove that it was ſubſtantially part of the territory of the *Ruſſian* empire; and they inſiſted that this muſt be taken to be the caſe, if the *Ruſſian* power was there dominant; if the ſupreme authority was veſted in the *Ruſſian* commander, although there might ſtill be kept up ſome empty forms of an imaginary republic.

The condition of *Corfu*, in *July* 1807, was deſcribed by a gentleman who had acted there as *Engliſh* conſul. He ſtated, that at the time there was a *Ruſſian* garriſon in *Corfu*, and the *Ruſſians* had about 6000 men in the different iſlands of the republic; that they had made *Corfu* a military ſtation for four or five years; and that they continued in poſſeſſion of it till the peace of *Tilſit*, when they delivered it up to *Bonaparte*: but that, previouſly to that event, the flag of the *Ionian* republic flew from the forts in the iſland; there was a port admiral appointed by the *Ionian* republic; a conſul from the Sublime Porte reſided at *Corfu*, and the witneſs was recognized as *Engliſh* conſul by the prince and ſenate of the *Ionian* republic, who continued in their functions till the republican government was diſſolved by the *French*.

Lord *Ellenborough*.—"I will not receive the ſentence under theſe circumſtances, the *Ruſſians* muſt be conſidered as viſitors in *Corfu*, and not as ſovereigns. While a government ſubſiſts as this did, we cannot look to the degree in which it might be overawed by a foreign force. The ſentence was pronounced by a belligerent on neutral territory, and is therefore void. I am by no means diſpoſed to extend the comity, which has been ſhewn to theſe ſentences of foreign admiralty courts, I ſhall die like Lord *Thurlow* in the belief, that they ought never to have been admitted. The doctrine in their favour reſts upon an authority in *Shower* (*a*), which does not fully ſupport it, and the practice of receiving them of ten leads in its conſequences to the greateſt injuſtice."

(*a*) Hughes v. Cornelius, 2 Show. 232.

In

In the enſuing term, application was made to the Court to ſet aſide this verdict, on the ground that the ſentence of the *Ruſſian* prize court had been improperly rejected. It was contended that *Corfu*, when occupied in the manner above-deſcribed by the *Ruſſian* troops, was either to be conſidered as a part of the *Ruſſian* empire, or as a co-belligerent with *Ruſſia* againſt the Porte, ſince the Emperor of *Ruſſia* derived the ſame advantages in a military point of view from this occupation of the iſland, as if he had ſeized it hoſtilely, or the *Ionian* republic had been his ally in the war he was carrying on. A rule *niſi* was reluctantly granted: but cauſe being ſhewn it was diſcharged.

Lord *Ellenborough*.—"It is impoſſible to ſay that the government of the *Ionian* republic was ſuperſeded at a time when its inſtitutions ſubſiſted, and its ſupremacy was recognized. How, then, was *Corfu* a co-belligerent? Only becauſe it endured an hoſtile aggreſſion. Will any one contend that a government which is obliged to yield in any quarter to a ſuperior force, becomes a co-belligerent with the power to which it yields? It may as well be contended, that neutral and belligerent mean the ſame thing. Indeed this would make us co-belligerents with *France*, becauſe we receded from *Corunna*."

Foſter & others v. Chriſtia, B. R. Eaſter, T. 49 Geo. 3.

In this caſe the policy was in the uſual form on goods on board the *Wolga*, "at and from *Hull* to the *Sound* and *St. Peterſburg*, including the riſk in craft from *Cronſtadt*, with a memorandum in the margin of the policy, that in caſe of partial loſs or damage, the net proceeds were to be the baſis of contribution." The loſs was averred, in different counts, to have happened of the goods and of the voyage by the perils of enemies, and by the arreſt, reſtraint, and detainment of kings, princes, and people. The *Wolga* failed with the goods on board with convoy from *Hull* on the 10th *October* 1807, to the *Sound*, where ſhe arrived. On the 16th ſhe proceeded on her voyage, and was at anchor off the town of *Drago* on the 20th, when ſhe was boarded by the crew of a boat from His Majeſty's brig *Muſcata*, with orders from His Majeſty's officers for the *Wolga* to put herſelf under the command of the King's ſhips in *Copenhagen* roads, and the boat's crew remained on board to inforce obedience to the orders. The *Wolga* weighed anchor accordingly, and came back to *Copenhagen* roads, where ſhe remained until

the 31ſt, when ſhe went to *Helſingberg* roads for convoy, and remained there waiting for convoy until *Saturday* the 7th *November*, when ſhe ſailed on her voyage under the convoy of His Majeſty's ſloop of war the *Ganet*. The *Wolga* proceeded on her voyage in the *Baltic* till the 16th *November* when the commander of the *Ganet* informed the captain of the *Wolga* that an embargo was laid on the 15th on all *Britiſh* ſhips and veſſels in the *Ruſſian* ports; he at the ſame time ordered the *Wolga* to proceed no further on her voyage, but to keep cloſe by him, and that the *Wolga* ſhould receive orders from the commander in chief in *Copenhagen* roads as to her future deſtination: when the *Wolga* arrived off *Copenhagen* ſhe was ordered by the King's officers to proceed down to *Helſingberg* roads, and afterwards the captain, under all the circumſtances of the caſe, thought it beſt to proceed to *England*, which he did accordingly, under convoy of His Majeſty's armed brig the *Providence*, and arrived at *Hull* on the 11th *December* 1807.

An embargo was in fact laid in the ports of *Ruſſia* upon all *Britiſh* ſhips and veſſels on the 15th day of *November* 1807, and war was declared, and hoſtilities commenced by the Emperor of *Ruſſia* againſt *Great Britain* on the 18th *December* 1807, and hoſtilities have continued from that time to the preſent.

If the *Wolga*, however, had not been detained by the King's officers ſhe would have arrived according to the uſual courſe of the voyage at *St. Peterſburg* and delivered her cargo there previous to the laying on of the embargo.

Upon the ſhip's arrival in the *Humber*, the goods inſured were ſafely landed and depoſited in the ſame ſtate as when firſt put on board in the warehouſes of the plaintiffs' agents, where they remained when the action was brought. On the 28th *December* the plaintiffs abandoned the goods to the defendant and the other underwriters.

Lord *Ellenborough*.—"There is nothing in the caſe Suppoſe there had been a detention by convoy; one ſhip ſails faſter than another; or ſuppoſe the winds and tides had been againſt them, as well might it be ſaid, if the winds and waves had not been contrary, or if we had not been under convoy, we ſhould

have arrived in sufficient time to avoid the effects of the embargo."

Judgment for the defendant.

This was an action on a policy of insurance made on the 20th of *October* 1807, on goods on board the ship *Susannah*, "from *London* to *Helsingberg*, the *Sound*, *Copenhagen*, all or either." Atkinson v. Abbott. B. R. Easter T. 49 G. 3.

It appeared that, previous to such insurance, a great naval and military force had been sent from this country to *Copenhagen* for the purpose of taking possession of the *Danish* capital and the fleet lying in that port, and that the *British* armament had effected this purpose, and had possessed themselves of *Copenhagen* after a bombardment, which ended in a capitulation, by which it was agreed to be evacuated by the *British* forces on the 19th of *October*, though, in fact, owing to some unavoidable delay, the evacuation did not take place till the 20th, but the fact of such evacuation was of course unknown at the time of the policy being effected; and though intelligence of it had reached this country before the vessel sailed from the *Nore*, and though the captain admitted, on his examination at the trial, that he had heard the report, yet he swore he did not believe it. The government, however, having anticipated the probability of hostilities with *Denmark*, consequent on the expedition and seizure of the *Danish* fleet, an order of the King in council, issued on the 2d of *September* 1807, prohibiting the clearing of any *British* ship from this country for any port in the dominions of the King of *Denmark*; in consequence of which no clearance could have been obtained by this vessel for any such port. And therefore though the true object of the adventure was to carry out provisions for the *British* armament, then supposed to be at *Copenhagen* or *Elsineur*, yet the captain on the 15th of *October* took a custom house clearance for *Helsingberg*, a *Swedish* and neutral port, to which he had no intention at the time to go; his consignees being *British* merchants at *Copenhagen* and *Elsineur* and his bills of lading for the *Sound* and *Copenhagen*. It appeared to be usual at the custom house to take out a clearance for one only of the ports to which the ship was destined. The policy was effected on the 20th, and he sailed from the *Nore* on the 22d of *October*, and was captured by a *Danish* vessel on the 11th of *November* at the entrance of the *Sound* in his way to

Copenhagen, where he ſtill expected to meet the *Britiſh* armament, and Mr. *Blanrock*, his conſignee on board a ſhip off that port. The jury were ſatisfied of the honeſt intention of the aſſured and of the captain in this adventure, to ſupply the *Britiſh* armament with the proviſions which were the ſubject of the inſurance; and being adviſed by Lord *Ellenborough* that the inſurance was not avoided by the cuſtom houſe clearance having been taken out for *Helſingberg* under theſe circumſtances, to which there was no contemplation at the time of proceeding, unleſs any circumſtances ſhould occur in the proſecution of the adventure to render it neceſſary, found a verdict for the plaintiff. Whereupon a rule was applied for in the laſt term for ſetting aſide the verdict, and granting a new trial on the ground, that the taking out a cuſtom houſe clearance for a place to which there was no intention of going in the courſe of the voyage, was ſuch a fraud as avoided the policy. After this caſe was fully argued,

Lord *Ellenborough* ſaid,—"I am perfectly ſatisfied, and ſo were the jury on the trial, that the voyage was not illegal either in intention or in act, but that the adventure was taken for the meretorious purpoſe of ſupplying the *Britiſh* fleet and forces, then underſtood to be in the poſſeſſion of *Copenhagen*. And though an order of the King in council, contemplating that this kingdom might be placed in a ſtate of warfare with *Denmark* in conſequence of the meaſures then meditated or in execution, had iſſued on the 2d of *September*, preceding the policy in queſtion, and though intelligence of the capitulation had been received in this country before the policy was effected, and the evacuation of *Copenhagen* was thus contemplated to take place on the 19th *October*, yet that will not affect the honeſty or legality of the tranſaction. The adventure may be ſaid to have begun on the 16th of *October*, when the veſſel left her moorings in the river; the object of it was to ſupply the *Britiſh* fleet and forces engaged in the expedition to *Copenhagen* with proviſions; and though the evacuation of the place was contemplated to take place on the 19th, yet circumſtances might intervene to delay the departure of our forces, their proviſions might be expected to be at a low ebb; the conſignment was made, not to the ſubjects of *Denmark*, but to a *Britiſh* merchant at *Copenhagen*, who, if the evacuation had taken place at the time of the ſhip's arrival was

was expected to be found on board a *Britiſh* ſhip off that port. There could then be no objection to the legality of the adventure, if the avowed object of it had been diſcloſed, and the ſhip had cleared out at once for *Copenhagen* at this period: but the order of council ſtood in the way of getting a clearance for *Copenhagen* which had been iſſued as a precautionary meaſure to prevent the veſſels of this country from being detained in the *Daniſh* ports in the event of hoſtilities: to obviate this difficulty the clearance was taken out for *Helſingberg*, a *Swediſh* port, without any purpoſe of defeating the order of council, or trading with any enemy. This is conditionally done upon adventures for ſupplying the *Britiſh* armies and fleets in foreign ſervice. Nor is it to be taken for granted that in no event whatever was the ſhip to go into *Helſingberg* in the proſecution of this adventure. The captain had certainly no immediate intention of going there, but if he found that the *Britiſh* armament had left the *Daniſh* territories before his arrival, he might have found it expedient to proceed to the neighbouring *Swediſh* port, which he was entitled to do within the terms of the policy. But I am ſatisfied that would not have made the inſurance illegal if the captain had never meditated to go into *Helſingberg* at all. There is nothing illegal ſo as to avoid a policy in the mere circumſtance of the ſhip taking out a clearance for a place named in the policy to which there is no intention of going. The ſtatute of 13 & 14 *Car.* 2. c. 11. ſ. 3. only gives a penalty of 100*l.* for taking out a falſe clearance; but there is nothing in that act to make the voyage illegal. That was determined in *Planche* v. *Fletcher*, Douglas, 251. and though the particular ſtatute is not referred to in the report of the caſe, yet the proviſion of it was probably in the contemplation of the Court. And here the object of the voyage was not illegal but meretorious. The aſſured never meant to go to a *Daniſh* port, as ſuch, but merely for the ſupply of the *Britiſh* fleet and army then ſuppoſed to be lying off *Copenhagen*. And the jury was quite ſatisfied of the fact."

Mr. Juſtice Groſe declared himſelf of the ſame opinion.

Mr. Juſtice Le Blanc.—"If it had been made out in evidence, that this was a voyage intended to ſupply the enemy with proviſions, that would at once have avoided the policy; but the defend-

defendant failed in his attempt to do that, and the jury were ſatisfied that that was not the object of the adventure. The obvious intention of it, and ſo it was underſtood by the jury, was to ſupply our own fleet and army off *Copenhagen*; and if on his approach to that place the captain had not found the fleet there, he would probably have gone to *Helſingberg*. It has been determined that the mere circumſtance of taking a clearance to a place, where a ſhip does not intend to go, does not make the voyage illegal ſo as to vacate the policy: but I am not ſatisfied that the captain had determined not to go to *Helſingberg* in any event."

Mr. Juſtice Bayley.—"The whole of the evidence ſhews that the object of the voyage was to ſupply our fleet engaged upon the expedition to *Copenhagen*, with proviſions, and not to run into an enemy's port, where the veſſel would be ſure to be captured."

Rule diſcharged.

APPENDIX, No. I.

Policy of Insurance on Ship or Goods.

In the Name of God, *Amen.*

as well in own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in Part or in All, doth make Assurance, and cause and them and every of them to be insured, lost, or not lost, at and from

upon any Kind of Goods and Merchandizes, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present Voyage, or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called; beginning the Adventure upon the said Goods and Merchandizes from the loading thereof aboard the said Ship, upon the said Ship, *&c.* and so shall continue and endure, during her Abode there, upon the said Ship, *&c.* And farther, until the said Ship, with all her Ordnance, Tackle, Apparel, *&c.* and Goods and Merchandizes whatsoever, shall be arrived at upon the said Ship, *&c.* until she hath moored at Anchor Twenty-four Hours in good Safety; and upon the Goods and Merchandizes, until the same be there discharged and safely landed. And it shall be lawful for the said Ship, *&c.* in this Voyage, to proceed and sail to and touch and stay at any Ports and Places whatsoever without Prejudice to this Insurance, the said Ship, *&c.* Goods and Merchandizes, *&c.* for so much as concerns the Assureds by Agreement between the Assureds and Assurers in this Policy are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to bear, and do take upon us in this Voyage, they

they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettiſons, Letters of Mart and Counter-mart, Surprizals, Takings at Sea, Arreſts, Reſtraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality ſoever, Barratry of the Maſter and Mariners, and of all other Perils, Loſſes and Misfortunes, that have or ſhall come to the Hurt, Detriment, or Damage, of the ſaid Goods and Merchandizes and Ship, *&c.* or any Part thereof. And in Caſe of any Loſs or Misfortune, it ſhall be lawful to the Aſſureds, their Factors, Servants, and Aſſigns, to ſue, labour and travel for, in and about the Defence, Safeguard, and Recovery of the ſaid Goods and Merchandize and Ship, *&c.* or any Part thereof, without Prejudice to this Inſurance; to the Charges whereof we the Aſſurers will contribute each one according to the Rate and Quantity of his Sum herein aſſured. And it is agreed by us the Inſurers, that this Writing or Policy of Aſſurance ſhall be of as much Force and Effect as the ſureſt Writing or Policy of Aſſurance heretofore made in *Lombard-ſtreet*, or in the *Royal Exchange*, or elſewhere in *Londou*. And ſo we the Aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own Part, our Heirs, Executors, and Goods to the Aſſured, their Executors, Adminiſtrators and Aſſigns, for the true Performance of the Premiſes, confeſſing ourſelves paid the Conſideration due unto us for this Aſſurance by the Aſſured

at and after the Rate of

In Witneſs whereof we the Aſſurers have ſubſcribed our Names and Sums aſſured in *London*.

N. B. Corn, Fiſh, Salt, Fruit, Flour, and Seed, are warranted free from Average, unleſs general, or the Ship be ſtranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average, under Five Founds *per Cent.* And all other Goods, alſo the Ship and Freight, are warranted free of Average under Three Pounds *per Cent.* unleſs general, or the Ship be ſtranded.

APPENDIX, No. II.

Form of a Reſpondentia Bond.

KNOW all Men by theſe Preſents, That

held and firmly bound to

in the Sum, or Penalty of
of good and lawful Money of *Great Britain*, to be paid to the ſaid
or to certain Attorney, Executors, Adminiſtrators, or Aſſigns; to which Payment, well and truly to be made Heirs, Executors, and Adminiſtrators, firmly by theſe Preſents, ſealed with
Seal. Dated this
Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, and ſo forth, and in the Year of our Lord One thouſand eight hundred and The Condition of the above-written Obligation is ſuch, that whereas the above-named hath, on the Day of the Date above-written, lent unto the above-bound
the Sum of upon the Merchandize and Effects, to that Value laden, or to be laden, on board the good Ship or Veſſel called the of the Burthen of Tons or thereabouts, now in the River *Thames*, whereof is Commander. If the ſaid Ship or Veſſel do, and ſhall with all convenient Speed, proceed and ſail from and out of the ſaid River of *Thames*, on a Voyage to any Ports or Places in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*, and from thence, do and ſhall ſail and return unto the ſaid River of *Thames*, at or before the End and Expiration of Thirty-ſix Calendar Months, to be accounted from the Day of the Date above-written, and that without Deviation (the Dangers and Caſualties of the ſeas excepted). And if the above-bound
Heirs, Executors, or Adminiſtrators, do and ſhall, within
Days next after the ſaid Ship, or Veſſel, ſhall be arrived in the ſaid River of *Thames*, from the ſaid Voyage, or at the End and Expiration of the ſaid Thirty-ſix Calendar Months, to be accounted as aforeſaid (which of the ſaid Times ſhall firſt and next happen) well and truly pay, or cauſe to be paid, unto the above-named Executors, Adminiſtrators, or Aſſigns, the Sum of of lawful Money

of

of *Great Britain*, together with
of like Money, by the Calendar Month, and ſo proportionably for a greater or leſſer Time than a Calendar Month, for all ſuch Time, and ſo many Calendar Months, as ſhall be elapſed, and run out of the ſaid Thirty-ſix Calendar Months, over and above twenty Calendar Months, to be accounted from the Day of the Date above-written; or if in the ſaid Voyage, and within the ſaid Thirty-ſix Calendar Months, to be accounted as aforeſaid, an utter Loſs of the ſaid Ship, or Veſſel, by Fire, Enemies, Men of War, or any other Caſualties ſhall unavoidably happen; and the above-bound
Heirs, Executors, or Adminiſtrators, do and ſhall, within Six Months next after the Loſs pay and ſatisfy to the ſaid Executors or Adminiſtrators, or Aſſigns, a juſt and proportional Average on all Goods and Effects which the ſaid
carried from *England* on board the ſaid Ship or Veſſel, and on all other the Goods and Effects of the ſaid which ſhall acquire during the ſaid Voyage, and which ſhall not be unavoidably loſt: then the above-written Obligation to be void, and of no Effect; or elſe to ſtand in full Force and Virtue.

Sealed and delivered (being firſt duly ſtampt) in the Preſence of } *J. S.*

APPENDIX, No. III.

Form of a Policy of Inſurance upon a Life.

In the Name of God, *Amen.*

do make Aſſurance, and cauſe to be aſſured upon natural Life aged for and during the Term and Space of
Calendar months, to commence this Day of in the Year of our Lord One thouſand ſeven hundred and fully to be complete and ended. And it is declared, that this Aſſurance is made to and for the Uſe, Benefit, and Security, of the ſaid
Executors, Adminiſtrators, and Aſſigns, in caſe of the Death of the ſaid
within

within the Time aforesaid, which the above Governor and Company do allow to be good and sufficient Ground and Inducement for making this Assurance, and do agree that the Life of the said is and shall be rated and valued at the Sum assured: The said Governor and Company therefore, for and in Consideration of *per Cent.* to them paid, do assure, assume, and promise, that the said shall, by the Permission of Almighty God, live, and continue in this natural Life, for and during the said Term and Space of Calendar Months, to commence as aforesaid; or in Default thereof, that is to say, in case the said shall, in or during the said Time, and before the full End and Expiration thereof, happen to die, or decease out of this World by any Way or Means whatsoever, that then the abovesaid Governor and Company will well and truly satisfy, content, and pay unto the said Executors, Administrators, or Assigns, the Sum or Sums of Money by them assured, and are here underwritten, hereby promising and binding themselves and their Successors to the Assured, Executors, Administrators, or Assigns, for the true Performance of the Premises, confessing themselves paid the Consideration due unto them for this Assurance by the Assured. *Provided* always, and it is hereby declared to be the true Intent and Meaning of this Assurance, and this Policy is accepted by the said upon Condition that the same shall be utterly void and of no Effect, in case the said shall exceed the *Age* of or shall voluntarily go to *Sea* or into the *Wars*, by Sea or Land, without Licence in Writing first had or obtained for so doing, any Thing in these Presents to the contrary hereof in anywise notwithstanding. In witness whereof the said Governor and Company have caused their common Seal to be hereunto affixed, and the Sum or Sums by them assured to be here underwritten, at their office in *London*, this Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, &c. and in the Year of our Lord One thousand eight hundred and The said Governor and Company are content with this Assurance for £.

APPENDIX, No. IV.

Form of a Policy of Inſurance againſt Fire.

BY the Corporation of the *Royal Exchange* Aſſurance of Houſes and Goods from Fire

This preſent Inſtrument or Policy of Aſſurance witneſſeth, That whereas
agreed to pay into the Treaſury of the Corporation of the *Royal Exchange* Aſſurance, at their Office on the *Royal Exchange, London*, for the Aſſurance of
from Loſs or Damage by Fire. *Now know all Men by theſe Preſents*, That the capital Stock, Eſtate, and Securities of the ſaid Corporation ſhall be ſubject and liable to pay, make good, and ſatisfy unto the ſaid Aſſured Heirs, Executors, or Adminiſtrators, any Loſs or Damage which ſhall or may happen by Fire to the ſaid Goods aforeſaid (except ſuch Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glaſs, China, and Earthen Wares, Writings, Books of Accounts, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gun-powder, Hay, Straw, and Corn unthreſhed), within the Space of twelve Calendar Months from the Day of the Date of this Inſtrument or Policy of Aſſurance, not exceeding the Sum of

and ſhall ſo continue, remain, and be ſubject and liable, as aforeſaid, from Year to Year, to be computed from the
Day of in every Year, for ſo long Time as the ſaid Aſſured ſhall well and truly pay, or cauſe to be paid, the Sum of into the Treaſury of the ſaid Corporation, on or before the Day of
which ſhall be in each ſucceeding Year, and the ſaid Corporation ſhall agree thereto by accepting and receiving the ſame; which ſaid Loſs or Damage ſhall be paid in Money immediately after the ſame ſhall be ſettled and adjuſted, or otherwiſe, if the ſaid Loſs or Damage ſhall not be adjuſted, ſettled, and paid within ſixty Days after Notice thereof ſhall be given to the ſaid Corporation, by the ſaid Aſſured, that then the ſaid Corporation, their Officers, Workmen, or Aſſigns, ſhall, at the Charge of the ſaid Corporation, at the End and Expiration of the ſaid ſixty Days, provide and ſupply the ſaid Aſſured with the like Quantity of Goods of the ſame Sort and Kind,

and of equal Value and Goodneſs with thoſe burnt or damnified by Fire. *Provided always nevertheleſs*, and it is hereby declared to be the true Intent and Meaning of this Deed or Policy, That the ſaid Stock, Eſtate, and Securities of the ſaid Corporation ſhall not be ſubject or liable to pay or make good to the Aſſured any Loſs or Damage by Fire, which ſhall happen by any Invaſion, Foreign Enemy, or any military or uſurped Power whatſoever. *Provided alſo*, That this Deed or Policy ſhall not take Place or be binding to the ſaid Corporation until the Premium for one Year is paid, or in caſe the ſaid Aſſured ſhall have already made, or ſhall hereafter make any other Aſſurance upon the Goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the Back of this Policy: or if the ſaid at the Time when any ſuch Fire ſhall happen, ſhall be in the Poſſeſſion of, or let to any Perſon who ſhall uſe or exerciſe therein the Trade of a Sugar-baker, Apothecary, Chymiſt, Colour-man, Diſtiller, Bread or Biſcuit-baker, Ship or Tallow-chandler, Stable keeper, Inn-holder, or Maltſter, or ſhall be made uſe of for the ſtowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine; but that in all or any of the ſaid Caſes theſe Preſents, and every Clauſe, Article, and Thing herein contained, ſhall ceaſe, determine, and be utterly void and of none Effect, or otherwiſe ſhall remain in full Force and Virtue. In Witneſs whereof the ſaid Corporation have cauſed their common Seal to be hereunto affixed, the Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of the United Kingdom of *Great Britain*, and *Ireland*, King, Defender of the Faith, *&c.* and in the Year of our Lord One thouſand eight hundred and

N. B. This Policy to be of no Force, if aſſigned, unleſs ſuch Aſſignment be allowed by an Entry thereof in the Books of the Company.

TABLE

OF THE

PRINCIPAL MATTERS.

Abandonment.

BEFORE a perſon inſured can demand from the underwriter a recompence for a total loſs, he muſt abandon to him whatever claims he may have to the property inſured. *Page* 109, 192

The time, within which ſuch an abandonment muſt be made, was not fixed in *England* till lately by any poſitive regulation or deciſion. 110, 239

Abandonment is as ancient as the contract of inſurance itſelf. 192

When an abandonment is made, it muſt be total, and not partial. *ibid.*

The inſured may in all caſes chuſe not to abandon; but he cannot at his pleaſure abandon, and thereby turn a partial into a total loſs. 193

The inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value; if the voyage be abſolutely loſt or not worth purſuing; if farther expence be neceſſary; or if the inſurer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs. 194, 201, 208

But he cannot abandon, unleſs at ſome period or other of the voyage there has been a total loſs; and if neither the thing inſured, nor the voyage be loſt, and the damage does not amount to a moiety of the value, he ſhall not be allowed to abandon. 195, 217

Abandonment muſt be made, though the property be converted into money. 240

The right to abandon muſt depend on the nature of the caſe at the time of the action brought, or at the time of the offer to abandon; and therefore if, at the time advice is received of the loſs, it appears that the peril is over and the thing in ſafety, the inſured has no right to abandon. *P.* 195, 207

Thus in a caſe where there was a capture and recapture, and it was ſtated that, at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held that the inſured had no right to abandon. 205

But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund; but the inſurer ſhall ſtand in his place for the benefit of ſalvage. 212

If the ſhip or goods are reſtored in ſafety between the offer to abandon and action brought, the aſſured cannot proceed as for a total loſs. 213

If the voyage be defeated by damage done to the ſhip, the aſſured may abandon 221

It is not a loſs within the policy, for which the aſſured can abandon, and recover as for a total loſs of cargo, that the port of deſtination has been ſhut by order of the enemy againſt ſhips of the nation to which the ſhip inſured belongs. 223

If a ſhip, finding her port of deſtination ſhut, ſail back for her port of outfit, without intending to complete the voyage inſured, the underwriters are diſcharged. 226, 613

Where ſhip and freight are inſured by two ſeparate ſets of underwriters, and by reaſon of an embargo in a foreign port, there is an abandonment to both, whether the underwriters on ſhip are entitled to *freight* earned in conſequence of the embargo being taken off? From p. 227 to p. 236

Election to abandon, when to be made. *Page* 239
When notice of abandonment of a cargo must be given, to render the underwriters liable for a total loss. 156
Notice of abandonment necessary, though the ship and cargo had been sold, when notice of the loss was received. 240 note (*a*)

Action.

Action of *assumpsit* may be maintained by owner of ship against owner of part of the cargo, to recover proportion of general average. 179 note (*a*)
An action on the case lies against an agent for not having insured agreeably to the orders of his principal. 404 note (*a*)
The only difference between this action, and that on the policy against the underwriters, consists in form: for the plaintiff is entitled in this action to recover the precise sum he ordered to be insured; and the defendant has every benefit of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c. *ibid.*
Such an order to insure must be obeyed in the three following instances, otherwise this action will lie. First, where a merchant abroad has effects in the hands of his correspondent here. Second, where the merchant abroad has been *used* to send orders for insurance, and the one here to comply with them. Thirdly, if the merchant abroad send bills of lading, and engraft on them an order to insure, as the term of their acceptance. *ibid.*
If a merchant here accept an order for insurance, and limit the broker to too small a premium, by which means no insurance can be procured, this action lies. *ibid.*
An action of *indebitatus assumpsit*, for money had and received for the plaintiff's use, is the proper form of action, in order to recover the premium. 504, 537
In order to recover upon a policy against either of the insurance companies, the action must be *debt* or *covenant*, and they may plead generally. *Page* 535, 536
When money has been paid by mistake to be insured, it may be recovered back in an action for money had and received to the plaintiff's use. 537
In order to recover against a private underwriter upon the policy, the form of action is a special *indebitatus assumpsit*, founded upon the express contract. *ibid.*
The action may be brought in the name of the broker effecting the policy. 543
Within fifteen days after action brought, plaintiff, after request in writing, must declare the amount of all insurances on the same ship. 544
See title *Declaration.*

Adjustment.

When the quantity of damage sustained in the course of the voyage is known, and the amount which each insurer is to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss at so much *per cent.*" This is an adjustment. 161
After an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances. It is to be considered as a note of hand. 162
This rule has been since relaxed and explained. 163
Although an underwriter sign an adjustment, until he actually pays the loss he may avail himself of any defence, either upon the facts or the law of the case. 165
At least, unless his attention was particularly called to all the circumstances of the case, before he signed the adjustment. 166
After judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. 167
If a loss be total at the time of the adjustment, and the insurer pay for a total

total loſs, the inſured is not obliged to refund, if it ſhould afterwards turn out to be partial; but the inſurer will ſtand in the place of the inſured. *Page* 167

Admiralty.

The ſentence of a *French* conſul reſident in a neutral country upon a ſhip brought in there, is void by the law of nations. *ibid.*

But ſentence procured by captors in country of co-belligerent, good. 463

The ſentence of a foreign Court of Admiralty is concluſive, as to every thing contained in it; but where the cauſe of condemnation of a ſhip does not appear to be on the ſpecifick ground material to the point in iſſue, parole evidence muſt be allowed to explain it. 464

Thus it is not concluſive to ſhew that a ſhip was not neutral, unleſs it appeared that the condemnation went on that ground. *ibid.*

A ſentence of ſuch a court cannot be controverted collaterally in a civil ſuit. 466

If it appear evident that the ſentence proceeded upon the ground of the property not being neutral, that is concluſive evidence againſt the inſured, that he has not complied with his warranty, and the underwriter is diſcharged. 469, 470

Even where no ſpecial ground of condemnation is ſtated, but the ſhip is condemned as good and lawful prize, the Court here muſt conſider it as concluſive evidence that the property was not neutral. 471

If a foreign Court condemn a neutral as *enemy's property* for not having a liſt of the crew required by a *French* ordinance, and *adjudge it to be requiſite within the conſtruction of the treaty* between the countries, ſuch ſentence is concluſive. 472

Sailing without a paſſport as required by treaties between *America* and other ſtates is a non-compliance with a warranty of being an *American*. *Page* 473, note (*a*)

If a neutral ſhip be reſtored, but damages and coſts denied to the claimants, becauſe they had not fully complied with certain *French* ordinances, the aſſured may recover for the detention notwithſtanding. 474, note (*a*)

But if the ground of deciſion appear to be not on the ground of not being neutral, but on a foreign ordinance, manifeſtly unjuſt, and contrary to the laws of nations, and the inſured has only infringed ſuch a partial law, that ſhall not be deemed a breach of his warranty, ſo as to diſcharge the inſurer. 473

The only queſtion in all theſe caſes is this, did the Court of Admiralty mean to decide the queſtion whether the property belonged to an enemy or not? if they did mean to decide that queſtion, though they may have decided erroneouſly, it is concluſive evidence, that the warranty is not true; and the aſſured cannot be allowed to controvert the fact ſo eſtabliſhed. 474, 497

Where a foreign ſentence profeſſes to proceed on an infraction of treaty, ſuch ſentence concluſive againſt warranty. 486

Foreign ſentence evidence only of what it directly aſſerts in the adjudicative part of it. 495

If the ſhip be condemned as prize, and the grounds of the ſentence appear manifeſtly to contradict ſuch a concluſion, the Court here will not diſcharge the inſurers, by declaring that the inſured has forfeited his neutrality. 498

A ſhip warranted neutral forfeits her neutrality, if a Court of Admiralty condemn her on that ground for refuſing to be ſearched. 500

Proceedings in Admiralty Court can only be proved by producing the proceedings under the ſeal of that court. 502

Condemnation upon ſurvey not evidence of the facts ſtated in it. 548

Agent.

Where an agent is proved to have had authority to subscribe the policy, he shall be presumed to have authority to sign the adjustment. *Page* 162

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent;* for in either case the contract is founded in deception, and the policy is consequently void. 276, 278

This rule prevails, even though the act cannot be at all traced to the owner of the property insured. 276

Agent not insuring according to directions is liable to an action. 404

Alien. See *Enemy.*

Alteration.

A policy cannot be altered after it is signed. 1

Unless there be some written document to shew that the intention of the parties was mistaken; or unless it be altered by consent of the parties. 3

In what cases alteration of policy permitted by 35 *Geo.* 3. c. 63. p. 37, 38, 39.

Amalfitan Code.

Some account of it. Introd. p. xxiv.

Apportionment.

See Return of Premium.

Arbitration,

Effect of Clause of, in a Policy. 535

Arrival.

See titles, Risk, Continuance of Risk, and Construction of Policy.

Assignment.

Policies of insurance against fire are not assignable without consent of the office. 595

But in marine insurances, the policy may be transferred. *Page* 596, note (*a*)

Assumpsit. See *Action.*

Assurance. See *Insurance.*

Average, General.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of the goods saved, are to contribute for the relief of those whose goods are ejected: this contribution is called a general average. 133, 170

Average and contribution in commercial writers are synonimous terms. 170

All loss which arises in consequence of extraordinary sacrifices or expences incurred for the preservation of the ship and cargo comes within the description of general average. 170

The doctrine of average was introduced by the *Rhodians.* 171

Three things, it is said, must concur to make the act of throwing goods overboard legal: 1st, That what is so condemned to destruction be in consequence of a deliberate and voluntary consultation between the master and men. 2d, That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d, That the saving of the ship and cargo be owing to the means used with that view. But the 2d seems to be the only material one. 171

To an action of trespass for throwing goods overboard a man pleaded that he did it *navis levandæ causâ;* and that otherwise the passengers must have perished. The plea was held good. 172

If the *jettison* (that is, the throwing over of the goods) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved. *ibid.*

But if the ship, being once preserved by such means, be afterwards lost, the

property saved from the second accident shall contribute to the loss occasioned by the former jettison. *Page* 172
The various accidents and charges, which will entitle the suffering party to call for a contribution, enumerated. 173
If goods be put on board a lighter, to enable the ship to sail into a harbour, and the lighter perish, the owners of the ship and the remaining cargo are to contribute. *ibid.*
But if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute. *ibid.*
Not only the value of the goods thrown overboard must be considered in a general average; but also the value of such as receive any damage by wet, &c. from the jettison of the rest. *ibid.*
If a ship be taken and carried into port, and the crew remain to take care of and reclaim her, the charges of reclaiming and the wages and expences of the ship's company during her arrest, and from the time of her capture, it is said, shall be brought into a general average. *Qu.* 174
Not so for sailors' wages and provisions, during performance of a quarantine. *ibid.*
Quære. Whether extraordinary wages and victuals, during a detention by a foreign prince, not at war, be a subject of average. 174, 175
It seems that wages, &c. during a detention to repair, are. *Qu. ibid.*
So where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are a general average. 175
Diamonds and jewels, when a part of the cargo, must contribute according to their value. 175, 177
Ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, do not contribute. 176
Nor do bottomry or respondentia bonds in *England*. 176, 563
Nor the wages of the sailors. *Page* 176
In order to fix a right sum on which the average may be computed, we should consider what the whole ship, freight and cargo, would have produced neat, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportional part of the loss. *ibid.*
The goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted. 177
The contribution is, in general, not made till the ship's arrival at the port of discharge. 178
The insurer by his contract engages to indemnify the insured against all losses arising from a general average. *ibid.*
Contribution may be enforced in a Court of Equity. 179
Or an action at law may be maintained for it. 179. note (*a*)

Average Loss, vide *Partial Losses*.

Bankruptcy.

IF the original insurer become a bankrupt, it shall be lawful for him or his assigns to make a re-assurance to the amount before by him insured, provided it be expressed in the policy to be a re-assurance. 370
The act was held to prohibit re-assurances on foreign ships, except in the case of bankruptcy or death of the first assurer. 372
If the insurer, after the writing of the policy and before a loss happen, should become a bankrupt, the insured may prove his debt under the commission, as if the loss had happened previous to the bankruptcy of the underwriter. 371. note (*a*)
This statute has been held to extend to insurances upon lives. 580
If the borrower on bottomry becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt

under the commiſſion, as if the event had actually happened. *Page* 569

Barratry.

It is barratry in the maſter to ſmuggle on his own account. 41

The derivation of the word "*barratry*" is very doubtful. 111

Any act of the maſter, or mariners, of a criminal nature, or which is groſsly negligent, tending to their own benefit, to the prejudice of the *owners of the ſhip*, and without their conſent or privity, is barratry. *ibid.*

It muſt be ſome breach of truſt in the maſter *ex malificio*. 115. (*n*)

There muſt be ſomething fraudulent to conſtitute barratry 121

It is not neceſſary, in order to make the inſurers liable, that the loſs ſhould happen *in the very act of barratry*; for the moment the ſhip is carried from its proper track, with an evil intent, barratry is committed. 112, 119

But the loſs in conſequence of the act of barratry muſt happen *during the voyage inſured*, and within the time limited in the policy. 42, 112

If the act of the captain be done for the benefit of his owners, and not with a view to his own intereſt, it is not barratry. 112

If the owner of the ſhip freight it out for a ſpecific voyage, the freighter is to be conſidered as owner *pro hac vice*; and if the maſter commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. 112, 118

The inſurers, by expreſs words, undertake generally for the barratry of the maſter and mariners. 113

If a declaration ſtate a ſhip to have been loſt by the *fraud and negligence* of the maſter, that is a ſufficient averment of a loſs by *barratry*. *ibid.*

But where a ſhip ſailed a different courſe from that firſt intended, which alteration was publicly notified before the ſhip ſailed, and where the maſter was to have no benefit by the change, it was held not to be barratry. 114

So if a ſhip take a prize, and, inſtead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, againſt the orders of his owners, the captain is juſtified by neceſſity; and it is not barratry, becauſe not done to defraud the owners. *Page* 115

A ſhip was inſured from *London* to *Seville*; ſhe was let to freight for the voyage; ſhe ſailed from *London* to the *Downs*, from thence ſhe ſailed to *Guernſey, which was out of the courſe of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ſhip, *but not of the freighter for that voyage*. This was held to be barratry. 116

A breach of an embargo is an act of barratry in the maſter. 120

If the captain cruize for, and take a prize, contrary to his owner's inſtructions, it is barratry. *ibid.*

If the maſter trade with the enemy, even with a view to the advantage of his owners, this is barratry. 121

An act of the captain, *with the knowledge of the owners of the ſhip*, though without the privity of the owner of the goods, who happened to be the perſon inſured, is not barratry. 125

If the maſter of the ſhip be alſo the owner, he cannot be guilty of barratry. 127

The ſame rule prevails, if he commit an act, which would be barratry in any other maſter, even though he has mortgaged the ſhip. 128

The *onus* of proving the captain to be owner, lies upon the underwriter. *ibid*

If the words "*in any lawful trade*" be inſerted, ſtill the underwriters are anſwerable, if the captain commit barratry by ſmuggling on his own account. 129

If any captain, or mariner, belonging to any ſhip, ſhall wilfully burn or deſtroy her, to the prejudice of any merchant loading goods thereon, *or of any perſon underwriting any policy thereon*, or to the prejudice of the owner of the ſhip, he ſhall ſuffer death

death as a felon, without benefit of clergy. *Page* 130
If the offence be committed within the body of a county, the offender ſhall be tried in a court of common law; if upon the high ſeas, it ſhall be tried according to the directions of the 28th *Henry* 8, c. 15. 130, 131
It ſhould ſeem a lender on bottomry would not be liable for any accident ariſing from the barratry of the maſter. 563

Bill of Lading. See *Lading.*

Bottomry and Reſpondentia.

Bottomry is a contract, by which the owner of a ſhip borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip as a ſecurity for the repayment. 552
If the ſhip be loſt, the lender alſo loſes his whole money; but if not, he ſhall receive his principal and the ſtipulated intereſt, however it exceed the legal rate. *ibid.*
When the ſhip and tackle are brought home, they are liable, as well as the perſon of the borrower, for the money lent. *ibid.*
When the loan is not made upon the veſſel, but upon the goods, then the borrower only is *perſonally* bound to anſwer the contract, who is ſaid to take up money at *reſpondentia*. *ibid.*
In this conſiſts the chief difference between bottomry and *reſpondentia*; in moſt other reſpects they are the ſame. *ibid.*
There is a third kind of contract upon the mere hazard of the voyage, without any intereſt in the ſhip or goods. *ibid.*
This is prohibited as to *Eaſt India* voyages. 553
The borrower on reſpondentia can only inſure the ſurplus value of the goods over and above the money borrowed. 13
The lender alone can make inſurance on the money lent. 553
All contracts made by any of his Majeſty's ſubjects by way of bottomry on the ſhips of *foreigners* trading to the *Eaſt Indies* are null and void. *Page* 553
Q. Whether an *American* ſhip, ſince the declaration of American independency, be a *foreign* ſhip within the ſtatute? 554
Bottomry aroſe from the power given to the maſter of hypothecating the ſhip and goods for neceſſaries in a foreign country. 555 & *ib.* note (*a*)
But the ſhip muſt be *abroad*, and in a ſtate of *neceſſity* to juſtify ſuch an act of the maſter. *ibid.*
This ſpecies of contract was known to the *Rhodians*. 557
The principle, upon which bottomry is allowed, is, that the lender runs the riſk of loſing his principal and intereſt; and therefore it is not uſury to take more than the legal rate. 558
If a contract were made, by color of bottomry, in order to evade the ſtatute, it would be uſurious. 561
The legality of the contract defended. *ibid.*
But if the riſk be not run, the lender is not entitled to the extraordinary premium. 562
The riſks, to which the lender expoſes himſelf, are generally mentioned in the condition of the bond; and are nearly the ſame againſt which the underwriter in a policy of inſurance undertakes to indemnify. 563
But the lender is not liable for accidents ariſing from the miſconduct of the borrower. *ibid.*
Piracy is one of the riſks which the lender on bottomry runs. *ibid.*
If a loſs by *capture* happen, he cannot recover againſt the borrower. *ibid.*
But this does not mean a mere temporary taking; but it muſt be ſuch as to occaſion a total loſs. *ibid.*
Therefore where a ſhip was taken and detained for a ſhort time, and yet arrived at the port of deſtination within the time limited, it was held that the bond was not forfeited. 564
If the ſhip be loſt by a wilful deviation 10 from

from the track of the voyage, the event has not happened upon which the borrower was to be discharged from his obligation. *Page* 565
If the borrower becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commission, as if the event had actually happened. 569
Bottomry and respondentia may be insured, provided it be specified to be such interest in the policy. 12, 570
Unless the usage of trade sanctions a different proceeding. 13
When a person insures a bottomry interest, and recovers upon the bond, he cannot also recover upon the policy. 570
A lender on bottomry or at respondentia is neither entitled to benefit of salvage, nor liable to average by the law of *England*. 176, 564
It is otherwise in *France*, and in *Denmark*. 565.
But if a man insure respondentia interest on a *Danish* ship, and be obliged to contribute to an average loss by the laws of *Denmark*, *English* underwriters are bound to indemnify. *Ibid*
Q. Whether money may be lent on bottomry, or at respondentia to an enemy in time of war? 568

Broker.

The broker, by the custom, is liable to be sued by the insurer for premiums, notwithstanding the acknowledgement by the insurer, in the policy, that he has received them. 33
The broker may maintain an action against the insured, for premiums paid on his account. 34, 35
The broker has a lien upon all the policies in his hands for his general balance. 543, note (*b*)

See *Agent*.

Capture.

AS between the insurer and insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. *Page* 88, 101
If either before or after condemnation the owner retake her, and have paid salvage, the insurer must pay the loss so actually sustained. 88
If the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *ibid.*
A capture having been illegal, but the charges and delay being great, the insured made a compromise, *bonâ fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. 89
Before the statute of 19 *Geo.* 2. ch. 37. which abolished wager policies, the recapture had a considerable effect upon the contract of insurance. 92
But now the contract is not at all altered between an insurer and an insured. *ibid.*
The opinions of foreign writers with respect to capture and recapture stated 93
By the marine law of *England*, as practiced in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. 94, 188
But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever, upon the payment of stated salvage to the recaptors. 95. 188
Before the stat. of 19 *Geo.* 2. ch. 37. several cases were determined upon the questions of recapture in the *English* courts; but the same question can never again arise between an insurer and insured. 96 to 101

If

If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. *Page* 101

Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution. *ibid.*

See *Bottomry*.

Changing the Ship.

It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy, it follows as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences; in which case there would be no contract at all; nor during the voyage remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable necessity. 23, 383

If he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter. *ibid.*

The ship on which the risk is to be run, forms a material part of the contract. *ibid.*

The opinions of *English* mercantile writers, and of foreign authors stated. 383, 384

Expressly held in *England* that the insured, except in cases of real necessity, have no right to change the bottom of the ship; for when an insurance is made on a specifick ship, and the insured, without the consent of the underwriter, changes the ship, he has not kept his part of the contract. 385, 386

Cloaths.

The master's cloaths are not included under a general insurance *on goods*. 25

Commencement of the Risk.

On the goods, it is usually *from the loading*; on the ship, from the *beginning to load*. *Page* 27

On a policy, "at and from *Bengal* to *England*" the risk commences *from the first arrival* at *Bengal*. 51

So at and from *Jamaica* to *London*. 52

Compass (*Mariner's*.)

Invented by a native of *Amalfi*; and it contributed greatly to the revival of commerce. Introd. xxii.

Coin.

Whether insurable as *goods*. 25

Commission.

Whether commissions of a consignee of the cargo are insurable. 355

Concealment, see *Fraud*.

Condemnation, see *Admiralty*.

Consent.

A policy previous to the stamp duty on policies might have been altered by consent, even after it was signed. 3

Consolidation Rule.

For the history of the consolidation rule in insurance causes, see the Introduction, page xliii.

Construction of the Policy.

A policy must always be construed as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. 40, 62

As policies are to be liberally construed, whatever is done by the master in the usual course, for goods reasons, though a loss happen thereon, the insurer is liable. *ibid.*

No rule has been more frequently followed in questions of construction, than *the usage of trade*, with respect to the voyage insured. *ibid.*

A po-

A policy on a ſhip generally from *A.* to *B.* was conſtrued to mean till the ſhip was *unloaded.* *Page* 40, 41
But if it contained the uſual words "*till moored twenty-four hours in ſafety;*" the inſurers ſhall be anſwerable for no loſs that does not happen before the expiration of the time. 41
Even though the loſs was occaſioned by an act committed during the voyage inſured. *ibid.*
If a ſhip be inſured for ſix months, and three days before the expiration of the time, receive her death's wound, but by pumping is kept afloat till three days after the time, the inſurer is diſcharged. 43
The loſs muſt happen during the continuance of the voyage, or within 24 hours after her mooring at the port of deſtination. 44
Under a policy containing thoſe words, the underwriters were held liable for a ſubſequent loſs; becauſe the captain the very day on which the ſhip arrived at her moorings, was ſerved with an order from government to return in order to perform quarantine: and therefore the ſhip could not be ſaid to have moored 24 hours *in ſafety*, although ſhe did not go back for ſome days. 45
In a policy upon *freight*, if an accident prevent the ſhip from ſailing, the inſured cannot recover the *freight*, which he *would have earned*, if ſhe had completed her voyage. 46
But if the policy be a *valued* policy, and part of the cargo be on board when ſuch accident happens, the inſured may recover to the whole amount. *ibid.*
If a ſhip, from ſtreſs of weather, is in a decayed condition, and goes to the neareſt place to refit, it is to be conſidered in the ſame light, as if ſhe had been repaired at the very place from which the voyage was to commence, and no deviation from the terms of the policy. 50
When a ſhip is inſured, "at and from *Bengal* to *London*," *the firſt arrival at Bengal* is intended to be the commencement of the riſk. 51
When an inſurance is "*at and from*," the ſhip is protected during her preparation for the voyage; but if all thoughts of the voyage be laid aſide, the inſurer is diſcharged. *Page* 51
Where there was an inſurance on the outward and homeward bound voyage, and the latter ran "*at and from Jamaica* to *London;*" it was held, that the homeward riſk began when the ſhip moored at any part of the iſland, and that there the outward riſk ended, and did not continue till ſhe came to the laſt port of delivery. 52
This caſe confirmed as to a policy *on the ſhip*, but the outward riſk *on goods* continues till they are landed. *ibid.*
In conſtruing policies, the *ſtrictum jus* or *apex juris*, is not to be the rule, but a liberal conſtruction is to be adopted, and the uſage of the trade called in to explain any doubts. 54
Thus in an inſurance on goods from *Malaga* to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and reſhipped in one or more *Britiſh* ſhip or ſhips, and it appearing in evidence that there was no *Britiſh* ſhip at *Gibraltar*, but the goods had been unloaded and put into a *ſtore ſhip*, (which was always conſidered as a warehouſe), the inſurers were held to be liable for the loſs of theſe goods in the ſtore ſhip. 53
A ſhip was inſured from *London* to any place beyond the *Cape of Good Hope*. The ſhip arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the ſails, &c. were taken out, and lodged in a *bank ſaul*, on an iſland in the river (which was proved to be *uſual*, and beneficial to all concerned), the underwriter was held liable for the loſs of the ſails by fire, while in this *bank ſaul*. 55
The inſurer, at the time of underwriting, has under his conſideration the nature of the voyage, and the uſual manner of doing it. 56
What is uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is

is underſtood to be referred to by every policy. *Page* 57

If a ſhip be driven a mile on ſhore by a hurricane, or be burnt in a dry dock, while repairing, the inſurer is liable. *ibid.*

Every underwriter is preſumed to be acquainted with the practice of the trade he inſures. 59, 605

General rules for conſtruction of policy. 62

When a man inſures one ſpecies of property, he cannot recover damage occaſioned by the loſs of a ſpecies of property different from that named in the policy. 69

Under a policy *upon the ſhip*, or *upon the goods*, the inſured cannot recover *extraordinary wages* paid to the ſeamen, or *proviſions* expended, during a detention to repair, or a detention by an embargo. 69, 70

Nor is the underwriter *on goods* liable for *the freight* paid by the owner of the goods to the proprietors of the ſhip, where the goods were partially loſt. 70, 71

In the conſtruction of policies, the loſs muſt be *a direct and immediate conſequence* of the peril inſured, and not a remote one, in order to entitle the inſurer to recover. 77

In the conſtruction of a policy upon time, the ſame liberality prevails as in other caſes; and an attention to the meaning of the contracting parties has always been paid. 79

In an inſurance at and from *Liverpool* to *Antigua, with liberty to cruiſe ſix weeks*; it was held, that this meant a connected portion of time, and not a deſultory cruiſing for ſix weeks *at any time*. *ibid.*

Of the Conſtruction of Eaſt India Policies, ſee *Eaſt India Voyages.*

Of the Conſtruction of Loſſes by Perils of the Sea, ſee *Perils of the Sea.*

Of the Conſtruction of Loſſes by Capture, ſee *Capture.*

Of the Conſtruction of Loſſes by Detention, ſee *Detention.*

Of the Conſtruction of Loſſes by Barratry, ſee *Barratry.*

Conſular Sentences, ſee *Admiralty.*

Continuance of the Riſk.

On the ſhip till her arrival at the port of deſtination, and till ſhe has been moored 24 hours in good ſafety for the purpoſe of unloading. *Page* 27, 52

On the goods till they are ſafely landed at the port of deſtination; which includes the carriage in the ſhip's boat to the ſhore, but not in the boat of the owner of the goods. 27

If a policy be general on a ſhip from *A.* to *B.* the underwriter has been held anſwerable till the ſhip is unloaded. 41

But if it contain the uſual words "till moored 24 hours in ſafety;" the inſurer is liable for no loſs that does not happen before the expiration of that time. *ibid.*

Even though it be occaſioned by an act done during the voyage inſured. *ibid.*

If the maſter, during the voyage, commit an act of barratry by ſmuggling, and the ſhip be not ſeized till near a month after her arrival at the port of deſtination, the inſurer is diſcharged. *ibid.*

If a ſhip be inſured for ſix months, and three days before the expiration of that time receive her death's wound, but by pumping is kept afloat till three days after, the inſurer is not liable. 43

But the ſhip cannot be ſaid to have moored 24 hours in ſafety, when the very day, on which ſhe arrives at her moorings, the Captain is ſerved with an order to return to perform quarantine, although he does not obey for ſome days; and therefore the inſurer is liable for a ſubſequent loſs. 45

So if embargo laid on, and afterwards detained as prize. *ibid.*

Contraband, see *Prohibited Goods*.

Contribution, see *Average, General*.

Convoy.

If the insured warrant that the vessel shall depart with convoy, and she do not; the policy is defeated. *Page* 442

A convoy means a naval force, under the command of that person whom government may happen to appoint. 442, 444, 454

And this, whether government pleases to appoint a relay of convoy from place to place, or a convoy to a given latitude and no farther. 454

So also what is a convoy is governed by usage. 456

Where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there, it was held not to be a departure with convoy, although she in fact joined and was lost in a storm. 443

Aliter, if the single ship be a part of the convoy. 446

Q. Whether sailing orders from the commander in chief to the particular ships are necessary to constitute a convoy? 444, 445

This seems now to be settled in the affirmative. 446

A convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government. 448

A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of such a warranty. 449

Although the words used, generally are "to depart," or to "sail with convoy;" yet it extends to sail with convoy throughout the voyage. *ibid.*

But an unforeseen separation from convoy is an accident, to which the underwriter is liable. 452

So held where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost. *Page* 452

Even where the ship has been prevented by tempestuous weather from joining the convoy, at least so as to receive the orders of the commodore, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy. 453

Otherwise if the not joining be owing to the negligence and delay of the captain. 454

Ships belonging to *Great Britain* must now sail with convoy, except in particular cases. 456

What description of ship is exempted from the above regulation. 458

Corn

Is a general expression in the memorandum at the foot of the policy, and has been held to include *peas, beans* and *malt*. 149

Court.

The proper court for the trial of questions relative to policies of insurance is a court of common law. 532

Courts of equity have no jurisdiction over such questions. *ibid.*

If indeed the trustee in a policy of insurance actually refuse his name to the *cestui que trust* in an action at law, that may be a ground of application to a court of equity. 534

So also an application may be made to a court of equity for a commission to examine witnesses residing abroad. *ibid.*

It is also allowable, where fraud is suspected, to apply to equity, in order to procure a disclosure of circumstances upon the oath of the insured. 534, 535

But in all other cases, a court of common law is the proper forum. *ibid.*

Even if the parties, by a clause in the policy, should agree to refer any dispute to arbitration, that will not oust the

the court of common law of its jurisdiction, unleſs a reference is in fact made, or is depending. *Page* 535

Court of Policies of Inſurance.

The hiſtory of its origin and decline. Introd. xli.

Cruiſe.

A liberty to cruiſe ſix weeks means to give a permiſſion to cruiſe for *ſix ſucceſſive weeks*, and not a deſultory cruiſing for forty-two days at any time. 79

Cruſades.

They contributed to the revival of commerce. Introd. xxi.

Date.

THE day, month, and year, on which the policy was executed, muſt be inſerted. 35

Declaration.

In order to entitle the inſured to recover expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy. 189

Thus, in a declaration on a policy on goods, it ſtated that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of ſalvage. 189

A declaration on a policy of inſurance muſt ſet out the policy, and aver that it was ſigned by the defendant; and that, in conſideration of the premium, he undertook to indemnify the inſured. 538

The declaration muſt then ſtate the intereſt of the inſured. 598, note (*a*)

It ſhould next ſhew the loſs to have happened by one of the perils mentioned in the policy; but it muſt ſtate it according to the truth. 598

To aver that the loſs happened by the *fraud and negligence of the maſter* is a ſufficient averment of *barratry*. *Page* 538

In a declaration for a *total*, the inſured may recover for a partial loſs. 539

Though the plaintiff appear in proof to have a larger intereſt than is averred in the declaration, yet he is entitled to recover. 542. *ib.* note (*a*)

The general iſſue, *non aſſumpſit*, is the uſual plea, except in the caſe of the corporations, to a declaration upon a policy. 545

The declaration need not ſtate the clauſe in the policy to refer diſputes to arbitration. 535

Deſtination.

Deſtination of the ſhip muſt be ſtated in the policy. 26

Detention.

The underwriter, by expreſs words, undertakes to indemnify againſt all damages ariſing from the detention of kings, princes, or *people*. 102, 103

People means the governing power of the country. *ibid.*

A detention is ſaid to be an arreſt or embargo in time of war or peace, laid on by the publick authority of a ſtate. *ibid.*

In caſe of an arreſt or embargo by a prince, though not an enemy, the inſured is entitled to recover againſt the inſurer. *ibid.*

In caſe of detention by a foreign power, which in time of war may have ſeized a neutral ſhip, in order to be ſearched for enemy's property, the charges conſequent thereon muſt be borne by the underwriter. 104

But a detention for non-payment of cuſtoms, or for navigating againſt the laws of thoſe countries, where the ſhip happens to be, ſhall not fall upon the underwriter. 105

The inſurers are liable for the payment of damage ariſing by the detention or ſeizure of ſhips, before the commencement of the voyage, where the riſk is "at and from" by the government of

of the country where the ſhip loads. *Page* 106.

Britiſh underwriter not liable for damages which owner of foreign veſſel may ſuſtain from embargo laid by *Britiſh* government on foreign ſhips. 109 *n.*

But where the aſſured is a ſubject of this country, he may recover againſt a *Britiſh* underwriter for the loſs ſuſtained by the detention of the *Britiſh* government. *ibid.*

American citizen cannot claim from *Engliſh* underwriter, for loſs occaſioned by embargo of *American* government. 609

If an *American* conſignor inſures in *England* from his own country to this, and the ſhip is detained by an embargo there, the *Engliſh* conſignee cannot recover upon the policy in reſpect of the advances he has made upon the cargo to the conſignor. *ibid.*

Before the inſured can recover in caſe of detention, he muſt abandon to the inſurer whatever claims he may have to the property inſured. 109, 110

The time, within which the abandonment muſt be made in ſuch caſes was not till lately aſcertained in *England* by any poſitive rule. *ibid.*

A detention by particular ordinances, which contravene, or do not form a part of the law of nations, is a riſk within a policy of inſurance. 499, 500

Deviation.

Is underſtood to mean a voluntary departure, without neceſſity or any reaſonable cauſe, from the regular and uſual courſe of the ſpecific voyage inſured. 387

Whenever this happens, the voyage is determined, and the inſurers are diſcharged from any reſponſibility. *ibid.*

The reaſon of this is, becauſe the ſhip goes upon a different voyage from that againſt which the inſurer undertook to indemnify *ibid.*

It is not material whether the loſs be or be not an actual conſequence of the deviation; for the inſurers are in no caſe anſwerable for a ſubſequent loſs, in whatever place it happen, or to whatever cauſe it may be attributed. *Page* 387

Neither does it make any difference whether the inſured was or was not conſenting to the deviation. *ibid.*

A ſhip being inſured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* paſs; and it was held to be a deviation. 388

If the maſter of a veſſel put into a port not uſual, or ſtay an unuſual time, it is a deviation. *ibid.*

The time a ſhip is detained in port for neceſſary repairs, the inſurance being *at and from*, is not to be conſidered unneceſſary delay, ſo as to avoid the policy. 388

Held, that where there is a policy on goods granting leave to *touch and ſtay* at a place, that confers no privilege on the aſſured to *break bulk* there. *ibid.*

But an inſurance on *ſhip and freight* is not vitiated by the ſhip taking in goods at a place into which ſhe was forced by neceſſity, although there was no liberty to trade given by the policy. 389

If ſeveral places are named in the policy, the ſhip muſt go to thoſe places in the order in which they are named, unleſs ſome uſage, or ſome ſpecial facts be proved to vary the general rule. 393

An inſurance from *A.* to *B. C. D.* and *E.* means a voyage to all or any of the places named; with this reſerve, that if the ſhip goes to more than one of theſe places, ſhe muſt viſit them in the order deſcribed in the policy. 394

If the deviation be but for a ſingle night, or for an hour, it is fatal. 395, 396

A ſhip was bound from *Cork* to *Jamaica*, under convoy. Being of force, ſhe, with two other veſſels, took advantage of the night, and cruized in hopes of meeting

meeting with a prize; it was held a deviation. *Page* 396

But if a merchant ſhip carry letters of marque, ſhe may *chaſe* an enemy, though ſhe may not *cruize*, without being deemed guilty of a deviation. *ibid.*

Liberty given to a merchant ſhip with a letter of marque, to *chaſe, capture, and man prizes* does not juſtify her in *lying to* for the purpoſe of protecting a prize as a convoy into port. 397

Q. Whether, in caſe of an inſurance of merchant ſhip *with or without letters of marque*, ſhe may chaſe veſſels for the purpoſe of capture, provided the original purſuit commences from a point in the courſe of the voyage? *ibid.*

Liberty to a merchant ſhip *to ſee prizes into port*, does not authorize her to ſtay till they receive neceſſary repairs, which they could not otherwiſe procure. 398

The doctrine of deviation is applicable to an inſurance on *freight*. 399

Wherever the deviation is occaſioned by abſolute neceſſity; as where the crew forced the captain to deviate, the underwriter continues liable. *ibid.*

The juſtifications for a deviation ſeem to be theſe; to repair the veſſel: to avoid an impending ſtorm; to eſcape from an enemy; or to ſeek for convoy. 400, 401

If a ſhip is decayed, and goes to the neareſt port to refit, it is no deviation. 401

Wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe: or, when in the due courſe of the voyage, is driven out of it by ſtreſs of weather; this is no deviation. 402, 403

If a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return to the point from which ſhe was driven. 403, 404

Where the excuſe for a deviation in going into a port is, a neceſſity to procure medical aſſiſtance for the captain and crew, the aſſured muſt ſhew that the ſhip was ſupplied with ſuch medicines and inſtruments as were likely to be neceſſary in the courſe of the voyage. *Page* 408, 409

A deviation may alſo be juſtified, if done to avoid an enemy or to ſeek for convoy at the place of rendezvous. *Page* 409

A ſhip was inſured from *London* to *Gibraltar*, warranted to depart with convoy. There was a convoy appointed for that trade at *Spithead*, but the ſhip was loſt on her way thither. The court held that the ſhip was protected by the inſurance to a place of general rendezvous. *ibid.*

Where a captain juſtifies a deviation by the uſage of a particular trade, there muſt be a clear and eſtabliſhed uſage; not a few vague inſtances only. 411

Wherever a ſhip does that, which is for the general benefit of all parties concerned, the act is as much within the ſpirit of the policy as if it had been expreſſed: and in order to ſay whether a deviation be juſtifiable or not, it will be proper to attend to the motives, end, and conſequences, of the act, as the true ground of judgment. *ibid.*

It has been held, that if a ſhip deviate from neceſſity, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. *ibid.*

In ſuch a caſe nothing more muſt be done than what the neceſſity requires. 415

Even in an inſurance on a trading voyage, ſuch trade muſt be carried on with uſual and reaſonable expediton, 415

A deviation *merely intended*, but never carried into effect, does not diſcharge the inſurers. 417

But if it can be ſhewn that the parties never intended to ſail upon the voyage inſured; if all the ſhip's papers be made out for a different place from that deſcribed in the policy; the in-

surer is discharged, though the loss should happen before the dividing point of the two voyages. *Page* 418

But where the *termini* of the voyage continue the same, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate, till actual deviation. 420

See also 420 note (*a*)

As it is settled that *a mere intention to deviate* will not vacate the policy, it follows as a consequence, and has been so held, that whatever damage happens before actual deviation, falls upon the underwriters. 421

Subject to the rules already advanced, deviation or not is a question of fact to be decided according to the circumstances of the case. *ibid.*

In cases of deviation, the premium is not to be returned. *ibid.*

Double Insurance.

It is where the same man is to receive two sums instead of one; or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property. 373

Difference between a re-assurance and a double insurance. *ibid.*

Where a man makes a double insurance he may recover his loss against which set of underwriters he pleases; but he can recover for no more than the amount of his loss. 374

But when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured. *ibid.*

But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value; as the master for wages; the owner for freight; one person for goods; and another for bottomry. 375

In what cases a man shall be said to make a double insurance; and when not, fully considered from *Page* 376 to 381.

If the same man for his own account, *though not in his own name*, insures doubly, it is still a double insurance. 378

The laws of foreign countries, upon the subject of double insurance, are far from being uniform. 381

East India Voyages.

THE usage of trade with respect to these voyages has been more notorious than in any other, the question having more frequently occurred. 64

The charter-parties of the *India* Company give leave to prolong the ship's stay in *India* for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general without limitation of time or place. *ibid.*

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy. 64, 67

In an insurance "from *London* to *Madras* and *China*, with liberty to "touch, stay, and trade, at any ports "or places whatsoever," the facts were; that when the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was sent by the council to *Bengal* to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage. 66

However, the parties may, by their own agreement, prevent such latitude of construction. 68

Nor need this be done by express words of exclusion, but if, *from the terms used*, it can be collected that the parties meant so, that construction shall prevail. *ibid.*

Insurance on a voyage undertaken in contravention of the rights of the *East India* Company, is void. *Page* 308.
How their rights are affected by the treaty with *America*. 309

Election.

Election to abandon, when to be made. 238, 239
Notice of abandonment must be given, though the ship and cargo have been sold. 240

Embargo.

An embargo is an arrest laid on ships or goods by public authority, to prevent ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. 103, 104
Q. Whether a prince in time of war may make use of the vessels he finds in his ports, to assist him in carrying on war? 104
Extraordinary wages paid to the seamen during an embargo, cannot be recovered against the insurer *on the ship*. 71
The king of *Great Britain, in time of war*, may lay an embargo on shipping in the ports of his kingdom
Q. Whether he may do it in time of peace? 104
Q. Whether, if an embargo be laid on by the *British* government, and a loss ensue, the underwriters are liable? 106, 107, 109 note (*a*)
The subjects of a foreign state cannot recover against an *English* underwriter for a loss occasioned by an embargo, or other act of their own government. 609
And if the foreign consignor cannot recover, because the loss is occasioned by the acts of his own government, the *English* consignee cannot apply the policy to his own benefit, in respect of advances he has made to the consignor. *ibid.*
The breach of an embargo is an act of barratry in the master. 120
If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *Page* 311

Enemy.

The question whether insurances on the property of an enemy are politic, considered. 16, 320
Such insurances are contrary to the law of *England*. *ibid.*
Trading with an enemy in time of actual war without the king's licence, is absolutely illegal. 316
But the licence may be qualified, and non-compliance with the requisitions of it will vitiate the policy, 317
What is necessary to be stated in a plea of alien enemy. 321, note (*a*)

Evidence.

Opinion of witnesses is not evidence. 80, 260
The *onus* of proving the captain to be owner, so as to get rid of a charge of barratry, lies upon the underwriters. 127
A policy will not be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved, and the burthen of proof lies upon the person wishing to take advantage of the fraud. 282
But positive and direct proof of fraud is not to expected; and from the nature of the thing circumstantial evidence is all that can be given. *ibid.*
The nature of circumstantial evidence considered. 283
The sentence of a foreign court of Admiralty is conclusive, and binding upon all the world, as to every thing contained in it: and cannot be controverted collaterally in a civil suit. 464, 466

See *Admiralty*.

The first piece of evidence to support an action on the policy is proof of the defendant's hand-writing to the policy. 545
What sufficient evidence of an agent being authorized to sign policies. *ibid.* note (*a*)

No parole evidence of any agreement ſhall be admitted, which tends to contradict the written policy. *Page* 546
The inſured muſt alſo prove his intereſt in the thing inſured, by a production of all the uſual documents, bills of ſale, bills of parcels, bills of lading, &c. *ibid.*
Captain's proteſt delivered by the broker to the aſſurers to get the loſs ſettled is not evidence for the defendant. 547, 548
Nor a ſentence of condemnation for non-ſeaworthineſs after a ſurvey of the facts ſtated in it. 548
A man having purchaſed goods abroad, in order to prove his intereſt, produced a bill of parcels with the receipt of the ſeller to it, and proved his hand; it was held to be ſufficient evidence. *ibid*
The plaintiff muſt prove that a loſs has happened by the very means ſtated in the declaration. *ibid*
But where the loſs is averred to be by perils of the ſea, it is allowable to give the expence of the ſalvage in evidence upon ſuch a declaration. 551

Factor.

THE lien which a factor has upon the goods of his principal, is ſuch an intereſt as will entitle him to recover on a general policy on goods. 13, 379

Felony.

Wilfully to caſt away, burn, or deſtroy, any ſhip to the prejudice of the owners of the ſaid ſhip, or any merchant loading goods thereon, or of the underwriter, is felony, without the benefit of clergy, in any captain, maſter, mariner, or other officer belonging to the ſhip ſo deſtroyed. 130, 287
Any perſon boring holes in a ſhip in diſtreſs, or ſtealing a pump belonging thereto, ſhall be guilty of felony without benefit of clergy. 184
Perſons convicted of ſtealing goods from a ſhip wrecked, or in diſtreſs, or of obſtructing the eſcape of any perſon from a wreck, or of putting out falſe lights to lead ſuch ſhip into danger, ſhall ſuffer as felons without benefit of clergy. *Page* 184
Where goods of ſmall value are ſtolen, without any circumſtances of cruelty, the offender may be indicted for petty larceny. *ibid.*
Perſons, in whoſe cuſtody ſhip-wrecked goods are found, not giving a ſatisfactory account, ſhall be committed to the common gaol for ſix months, or pay treble the value of ſuch goods. *ibid.*
Goods offered to ſale, ſuſpected of being ſhip-wrecked, ſhall be ſtopped, and the perſon ſo offering them, and not giving a ſatisfactory account, ſhall be committed to the common goal for ſix months, or pay treble the value of ſuch goods. *ibid.*
Perſons convicted of aſſaulting any magiſtrate or officer, when in diſcharge of his duty, reſpecting the preſervation of any ſhip, veſſel, goods, or effects, ſhall be liable to tranſportation for ſeven years. 186

Fire (inſurance againſt)

Is a contract, by which the inſurer undertakes, in conſideration of the premium, to indemnify the inſured againſt all loſſes, which he may ſuſtain in his houſe or goods, by means of fire, within the time limited in the policy. 587
The *London* Aſſurance Company inſert a clauſe in their propoſals, by which they declare, that they do not hold themſelves liable for any damage by fire, occaſioned by an invaſion, foreign enemy, or any military or uſurped power whatſoever. 857
Under this proviſo it was held, that the inſurers were not exempted from loſs by fire, occaſioned by a mob at *Norwich*, which aroſe on account of the high price of proviſions. 588
The Sun fire-office, in addition to theſe words

words add, "*civil commotion*;" it was held that the company, under thoſe words, were exempted from loſſes occaſioned by rioters, who roſe in the year 1780, to compel the repeal of a ſtatute, which had paſſed in favour of the *Roman* catholics. *Page* 591

When a loſs happens, the inſured muſt give immediate notice of his loſs; and as particular an account of the value, &c. as the nature of the caſe will admit. He muſt alſo produce a certificate of the miniſter and churchwardens, as to the character of the ſufferer, and their belief of the truth of what he advances. 594

This certificate is held to be a *condition precedent* to his right of recovery. 595, note (*a*)

In inſurances againſt fire, the loſs may be either partial or total. 595

Theſe policies are not in their nature aſſignable; nor can the intereſt in them be transferred without the conſent of the office. *ibid.*

When any perſon dies, the intereſt ſhall remain to the heir, executor, or adminiſtrator, reſpectively, to whom the property inſured belongs; provided they procure their right to be inderſed on the policy, or the premium be paid in their name. 596.

It is neceſſary the party injured ſhould have an intereſt or property in the houſe inſured, at the time the policy is made out, and at the time the fire happens; and therefore, after the leaſe of the houſe is expired, the inſured's aſſigning the policy does not oblige the inſurers to make good the loſs to the aſſignee. *ibid.*

The premium upon common inſurances is two ſhillings *per cent.* for any ſum not exceeding 1000*l.* and half a crown from 1000*l.* upwards. 602

Beſides which there is a duty to government of 2*s. per cent.* *ibid.*

This tax does not extend to publick hoſpitals. 603

If a houſe were deſtroyed by a foreign enemy the day after the policy is made, there would be no return of premium. *Page* 603

Fraud vitiates this ſpecies of contract. *ibid.*

Fire (loſs by)

If the captain of a ſhip voluntarily burn her to prevent her from falling into the hands of the enemy, this is a loſs by *fire* within the meaning of the policy. 51

Foreign Ships.

Inſurances on foreign ſhips without intereſt are not within the ſtatute of 19 *Geo.* 2. c. 37. 351

But re-aſſurances on foreign ſhips are void. 372

Fort.

A fort may be inſured againſt an attack from an enemy, for the benefit of the governor. 15

France.

An account of its commercial and maritime regulations; and the diſtinguiſhed authors, who have written upon the ſubject of inſurances. Introd. xxxii.

Fraud.

Policies are annulled by the leaſt ſhadow of fraud or undue concealment of facts. 242

Both parties are equally bound to diſcloſe circumſtances within their knowledge. *ibid.*

If the inſurer, at the time he underwrote, knew that the ſhip was ſafe arrived, the contract will be void. *ibid.*

Caſes of fraud upon this ſubject are liable to a threefold diviſion; 1ſt, The *allegatio falſi*; 2d, The *ſuppreſſio veri*; 3d, Miſrepreſentation. The latter though it happen by miſtake, if in a material

material part, will vitiate the policy as much as actual fraud. *P.* 242, 243
The policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy. 243
A ship was known to have sailed from *Jamaica*, on the 24th of *November*; and the agent told the insurer she sailed the latter end of *December*; the policy was declared void. 244
In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury, that they were not neutral. The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover. *ibid.*
Goods were insured on board a ship, warranted *Portuguese*. The goods were lost by a different peril, but in fact the ship was not *Portugueze*. The policy is void *ab initio*. 245
Concealment of circumstances vitiates all contracts of insurance. The facts upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter relies upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. 246
One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard. the policy was decreed in equity to be delivered up. 247
The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which is this expression: "On the 12th of this "month I was in company with the "*Davy* (the ship in question,) at "twelve at night lost sight of her "all at once; the captain spoke to "me the day before that she was "leaky, and the next day we had a "hard gale." The ship, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, because the letter was not communicated to the insurer. *Page* 247
A ship was insured "*at and from Genoa*." The ship loaded at *Leghorn* and was originally bound for *Dublin*; but losing her convoy, she put into *Genoa* in *August*, and lay there till the *January* following. All these facts were known to the insured, but not communicated to the insurer: the policy was held to be void. 248
A ship being bound from the coast of *Africa* to the *British West Indies*, sailed from *St. Thomas's* on the coast of *Africa* on the 2d of *October*, a circumstance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21st of *March*. The letter was not shewn, nor was any thing said of her sailing from *St. Thomas's*; but in the instructions "the ship was said to "have been on the coast the 2d of "*October*." The policy was held to be void. 249
The broker's instructions stated *the ship ready to sail on the 24th of December*; the broker represented to the underwriter that the ship was in port, when, in fact, she had sailed the 23d of *December*. The policy was void. 250
But there are many matters, as to which the insured may be innocently silent; 1st, As to what the insurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. An underwriter is bound to know particular perils, as to the state of war or peace. 251
If a privateer is insured, the underwriter need not be told her destination. *ibid.*
An insurance was made on *Fort Marlborough* in the *East Indies* for twelve months against the attacks of an *European* enemy, for the benefit of the governor. The defence set up was an undue concealment of circumstances, particularly the weakness of the fort, and the probability of its being

being attacked by the *French*. The court held that the policy was good. *Page* 251

The whole doctrine of concealment fully illuſtrated from page 251 to 264.

In effecting inſurance on homeward voyage, unneceſſary to communicate letter from captain, ſtating that ſhip had received great damage on outward voyage, and ſtood in need of conſiderable repairs. 254, note (*a*)

An underwriter refuſed to pay a loſs by capture, the ſhip being *Portugueſe* and condemned for having an *Engliſh* ſupercargo on board, becauſe the inſured had not diſcloſed that circumſtance. The court held that the condemnation was unjuſt, and was not ſuch a circumſtance as the inſured was bound to diſcloſe. 263

A repreſentation is a ſtate of the caſe, not forming a part of the written inſtrument of policy; and it is ſufficient if it be ſubſtantially performed. 264, 270

If there be a miſrepreſentation, it will avoid the policy as a fraud, but not as a part of the agreement. 264

Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is neceſſary that they make a part of the written inſtrument. 265

If a repreſentation be falſe in any material point, it will avoid the policy; becauſe the underwiter has computed the riſk upon circumſtances which did not exiſt. *ibid.*

Theſe principles illuſtrated from page 265 to 272

If the miſrepreſentation be in a *material* point, it will avoid the policy; even though it happen by miſtake. 272

The ſame rule holds if the broker conceal any thing *material*, though the only ground for not mentioning them ſhould be that the facts concealed appeared immaterial to him, 274

But the thing concealed muſt be ſome *fact*, not a *mere ſpeculation or expectation* of the inſured. 275

Thus where a broker inſuring ſeveral veſſels, ſpeaking of them all ſaid, "which veſſels are *expected* to leave "the coaſt of *Africa*, in *November* or "*December*" the policy was held good, although in fact the ſhip in queſtion had ſailed in the month of *May* preceding. *Page* 257

Wherever there has been an allegation of falſehood, a concealment of circumſtances, or a miſrepreſentation, it is immaterial whether it be the act of the perſon himſelf who is intereſted, *or of his agent*; for in either caſe the contract is founded in deception, and the policy is conſequently void. 276

This rule prevails, even though the act cannot be at all traced to the owner of the property inſured. *ibid.*

How far what is ſaid by the broker when the names of the underwriters are put upon a ſlip is to be conſidered a *repreſentation*. 473, 616

A policy will not be ſet aſide on the ground of fraud, unleſs it be *fully* and *ſatisfactorily* proved; and the burthen of proof lies on the perſon wiſhing to take advantage of the fraud. 282

But poſitive and direct proof of fraud is not to be expected; and from the nature of the thing, circumſtantial evidence is all that can be given. *ibid.*

The queſtion whether the premium is to be returned by the underwriter, where the inſured has been guilty of fraud, conſidered. 283

The ordinances of foreign ſtates declare for the moſt part, that it ſhall. *ibid.*

In *England* there has been no legiſlative regulation; and the courts of juſtice had not till lately adopted any general rule upon the ſubject. *ibid.*

In two or three inſtances, where the underwriters have been relieved in Chancery from the payment of the ſums inſured on account of fraud, the decree has directed the premium to be returned. *ibid.*

The queſtion came on to be conſidered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the inſurer having there made an offer of returning the

premium, the court of King's Bench conſidered this offer in the ſame light as if he had paid the money into court, and therefore the queſtion remained undecided. *Page* 285
But in a caſe where the fraud was of a very groſs and heinous nature, Lord *Mansfield* told the jury, that the premium ſhould not be reſtored to the inſured. 286
In all caſes of *actual* fraud on the part of the inſured or his agent, the premium is not to be returned. *ibid.*
It is clear that if the underwriter has been guilty of fraud, an action *lies* againſt him at the ſuit of the inſured, to recover the premium. *ibid.*
By ſeveral foreign ordinances, the puniſhment of fraud, in matters of inſurance, is exceedingly ſevere; ſometimes amounting even to death. *ibid.*
No puniſhment, except that of annulling the contract, has as yet been declared by the law of *England.* 287
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The freight or hire of ſhips, is a ſubject of inſurance. 11
In an inſurance upon *freight*, the inſured, if the ſhip be prevented by accident from ſailing, cannot recover the value of the freight, which *he would have begun to earn if the ſhip had ſailed.* 46
But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount. *ibid*
So in an *open* policy if the inſured be under a charter-party for a ſpecific freight. 47
So a policy on homeward freight attaches while the ſhip is delivering her outward cargo, where the voyage out and home is under the ſame charter-party. *Page* 48
In theſe caſes the criterion is, whether the voyage in which the ſhip is loſt be a part of the voyage inſured. 48, 49, 604
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WHENEVER an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. 307

It is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot substantiate a contract in direct contradiction to law. 311

If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *ibid.*

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But courts of justice will permit every thing to be done, though not expressed, which is necessary to effectuate the intention of his Majesty in granting the licence. *ibid.*

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Whether they are expedient or not, such insurances are contrary to law. 320

A policy on a foreign ship must be understood as virtually containing an exception of all captures made by the authority of the *British* government. 320

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Insurance on goods, the property of *Frenchmen*, shipped in *France* in time of peace, but exported after the commencement of hostilities, cannot be inforced against the underwriters upon the restoration of peace. 327

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No insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions. 328

Insurance.

Insurance is a contract, by which the insurer undertakes, in consideration of a premium, equivalent to the hazard run, to indemnify the insured against certain perils and losses, or against a particular event. Introd. ii.

The utility of this contract. Introd. *ibid.*

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But it must be specified in the policy to be such an interest, otherwise the policy is void. *Page* 1
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Intention.

The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. 40

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Interest (*Insurable*).

A special interest in goods may be insured, such as the lien of a factor 13
Money expended for the use of the ship by the captain is insurable, as goods, specie, and effects, especially if an usage has prevailed. 14
Wages of seamen, and commodities in lieu of wages, not insurable; but the goods of the captain, or his share in the ship, may. *ibid.*
Insurance on commission and privileges of captain in *African* trade, legal. 15
The governor of a factory abroad has an insurable interest in the safety of the place. *ibid.*

The

The owner of a ship having entered into a charter-party to go from the *Thames* to *Teneriffe*, and there to load a cargo of wines at a specific freight, has a good insurable interest in such freight; and if the policy be underwritten *at and from London to Teneriffe*, and from thence to the *West Indies*, he may recover, if the ship be lost in her way to *Teneriffe*. *Page* 47

The profits expected to arise on a cargo of molasses, belonging to the plaintiff, who had a contract with government to supply the army with spruce beer, are a good insurable interest 354

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Officers and crew of a ship, upon a joint capture by army and navy, have an insurable interest in the capture, before condemnation. 358

So of captors of ships in the voyage home for the purpose of bringing them to adjudication in the court of Admiralty. 359

So the *Dutch* commissioners have an insurable interest in the ships seized at sea to be brought into the ports of this kingdom. 360

[This case was affirmed in the Exchequer chamber.] 361

A creditor of a house abroad has an insurable interest on goods consigned to a third person for the purpose of paying his debt, though the creditor had not ordered the goods to be sent. 362

Various persons may insure various interests on the same thing, and each to the whole value. 375

Two partners purchased a ship under a regular bill of sale, conformable to Lord *Hawkesbury*'s act, (26 Geo. 3. c. 60.) and they afterwards took in two other partners, who paid their respective shares in the ship, but there was no transfer to them under the statute, and it was held that the *four* partners had not *an insurable interest in the freight*. 547, (note)

A merchant abroad, interested in goods, mortgaged them to his creditor here for payment of money at a certain day, the mortgagor has an insurable interest, though the mortgage become absolute before the order for insurance arrives. *Page* 548

The indorser of a bill of lading has still an insurable interest, if it appear that the effect of the indorsement was only intended to bind the net proceeds, in case the goods arrived. 547, note (*a*)

A person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. 574

But a creditor has such an interest in the life of his debtor, that he may insure. 575

Executor of a creditor may maintain an action on a policy made by himself. *ibid.*

Lading (Bill of)

A BILL of lading is an acknowledgment under the hand of the captain, that he has received certain goods, which he undertakes to deliver to the person named in the bill of lading; it is assignable in its nature, and by *indorsement* the property vests in the assignee. 547, note (*a*)

Where several bills of lading of different imports have been signed, no reference is to be had to the time when they were first signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. *ibid.*

Where bills of lading on the face of them are apparently different, and yet constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. *ibid.*

But if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance made on account of the indorser is good. *ibid.*

Lien.

The broker has a lien upon the policies in his hands for his general balance. 543. note (*b*)

Lighters.

Loſs of goods in ſhip's lighters falls upon the underwriters: *alter*, if in the owner's lighters. *Page* 27

Lives (*Inſurances upon*).

INSURANCE upon life is a contract by which the underwriter, for a certain ſum, proportioned to the age, health, and profeſſion of the perſon, whoſe life is the object of the inſurance, engages that that perſon ſhall not die within the time limited in the policy; or if he do, that he will pay a ſum of money to him, in whoſe favour the policy was granted. 571

The advantages reſulting from this ſpecies of contract ſtated. *ibid.*

It is impoſſible to aſcertain its antiquity. 573

No inſurance ſhall be made on the life or lives of any perſon or perſons; wherein the perſon, for whoſe uſe the policy is made, *ſhall have no intereſt, or by way of gaming or wagering:* but ſuch inſurance ſhall be null and void. *ibid.*

The holder of a note for money won at play has not an inſurable intereſt in the life of the maker of the note. 574

But a *bonâ fide* creditor has an inſurable intereſt in the life of his debtor. 575

But if after the death of the debtor his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died inſolvent, and the executors were furniſhed with the means of payment from another quarter than the eſtate of their teſtator. 576

Declarations of the perſon whoſe life was inſured as to his ſtate of health when the inſurance was effected, going to ſhare a fraud committed on the inſurer, are recoverable in evidence in an action on the policy. 578

In a life inſurance, the inſurer undertakes to anſwer for all thoſe accidents, to which the life of man is expoſed, except ſuicide, or the hands of juſtice. *ibid.*

The death muſt happen within the time limited in the policy; otherwiſe the inſurers are diſcharged. *ibid.*

If a man receive a mortal wound during the exiſtence of the policy, but does not in fact die till after, the inſurers are not liable. *Page* 578

But if a man whoſe life is inſured, goes to ſea, and the ſhip in which he ſailed is never heard of afterwards, the queſtion whether he did or did not die within the term inſured, is a fact for the jury to aſcertain from the circumſtances. 579

This ſort of policy being on the life or death of man, does not admit of the diſtinction between total and partial loſſes *ibid.*

In a life inſurance it has been held, that if the inſurer become bankrupt before the loſs happens, the perſon intereſted might prove the debt under the commiſſion, as if the loſs had happened before it iſſued. 580

A policy was made for one year from the day of the date thereof; the policy was dated 3d *Sept.* 1697. The perſon died on the 3d *Sept.* 1698, about one o'clock in the morning: and the inſurer was held liable. 581

It is now uſual to inſert in the policy "the firſt and laſt days included." 582

Fraud equally vitiates policies on lives, as in the caſe of marine inſurances. *ibid.*

Where there is a warranty that the perſon is in good health, it is ſufficient that he be in a reaſonable good ſtate of health, for it never can mean that he is free from the ſeeds of diſorder. 583

If the perſon whoſe life was inſured, laboured under a particular infirmity; if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the inſurer is liable. *ibid.*

If the perſon, whoſe life was inſured, ſhould commit ſuicide, or be put to death by the hands of juſtice, the next day after the riſk commenced, there would be no return of premium. 585, 586.

London.

What ſhall be deemed the port of *London.* 441, 442

London Aſſurance Company.

Erected by royal charter, authorized by ſtat. 6 *Geo.* 1. ch. 18. 6, 7, 8
This, and the Royal Exchange Aſſurance Company, are the only ſocieties which may inſure. 7
The privileges of the *South Sea* and *Eaſt India* Companies preſerved. 10
This company has a common ſeal. 6
It rejects the words "*or the ſhip be "ſtranded,*" in the memorandum at the foot of the policy. 24
This company, when ſued in an action of debt, may plead generally, that *they owe nothing*, and give the ſpecial matter in evidence. 535, 536
So when ſued in *covenant*, they may plead generally, "that *they have not "broken the covenant.*" *ibid.*
The company obtained his majeſty's charter to enable them to make inſurances upon lives. 572

Loſs.

The loſs muſt be a *direct and immediate conſequence* of the peril inſured, and not a remote one, in order to entitle the inſured to recover. 77
It is not a loſs within the policy, that the port of deſtination has been ſhut by order of the enemy againſt the ſhips of the nation to which the ſhip inſured belongs. 223, 240

Loſs by Perils of the Sea, vide *Perils of the Sea.*

Loſs by Capture, vide *Capture.*

Loſs by Detention, vide *Detention.*

Loſs by Barratry, vide *Barratry.*

Of an Average or Partial Loſs, vide *Partial Loſſes.*

Loſt or not Loſt.

Theſe words peculiar to *Engliſh* policies. *Page* 32

Malt

Is included under the word *corn* in the memorandum. 149

Market.

THE riſe or fall of the market is a charge which never falls upon the inſurer. 132, 139, 144

Maſter of Ships.

The name of the *maſter* muſt be inſerted in the policy. 20
Neither the maſter's cloaths, nor goods laſhed on deck, are included under a general inſurance *on goods.* 25
Whatever is done by the maſter of the ſhip in the uſual courſe of the voyage, neceſſarily *et ex juſta cauſa*, though a loſs happen thereon, the underwriter ſhall be anſwerable. 40
A *miſtake* of the maſter cannot be called a *peril of the ſea.* 83
Of barratry of the maſter, ſee *Barratry.*
The wearing apparel of the maſter is excepted from the allowance of ſalvage. 188

Memorandum.

The memorandum at the foot of the policy exempts the underwriters from partial loſſes not amounting to 3 *per cent.* unleſs it ariſe from a general average. 24, 135
It alſo provides, that the underwriters will not anſwer for any partial loſs on corn, fiſh, ſalt, fruit, flour or ſeed, unleſs occaſioned by a general average or the ſtranding of the ſhip; nor are they liable for any partial loſs on ſugar, tobacco, hemp, flax, hides, and ſkins, under 5 *per cent.* 24
If three cheſts of goods out of 101 be wholly

wholly ſpoiled, will the underwriter be liable? *Page* 136
Corn is a general expreſſion, and has been held to include *peas* and *beans* and *malt*. 149
The word Salt has been held not to include Salt-petre. *ibid.*
It has been held that the underwriters are not anſwerable, within that part of the memorandum which exempts them from all partial loſſes to corn, fiſh, ſalt, fruit, or ſeed, as long as the commodity ſpecifically remains, although wholly unfit for uſe. *ibid.*
This was held with regard to a cargo of *wheat*, partially damaged by a ſtorm. *ibid.*
A cargo of fiſh arrived, but was ſtinking, and wholly unfit for uſe, the inſurer was held not to be liable. 151
So of a cargo of fruit. 155
A cargo of *peas* arrived at the port of deſtination; but they were ſo much damaged, that the produce was three-fourths leſs than the freight; the inſurer was held to be diſcharged. 160
The effect of the memorandum diſcuſſed. 156

Miſdemeanor.

Any perſon, except thoſe mentioned in the ſtat. 12 *Anne*, ſtat. 2. ch. 18. entering a ſhip in diſtreſs, without leave of the ſuperior officer, or of the officer of the cuſtoms, or moleſting or hindering them in the preſervation of the ſhip, or defacing the marks of the goods on board, ſhall make double ſatisfaction, or be ſent to the houſe of correction for 12 months. 183
If goods ſtolen from ſuch ſhip ſhall be found on any perſon, they ſhall be delivered to the true owner, or ſuch perſon ſhall pay treble the value. *ibid.*

Miſſing Ship.

A ſhip that has been miſſing for conſiderable time, ſhall be conſidered as having foundered at ſea. 85
In practice, this time has been generally fixed to ſix months after the ſhip's departure for any part of *Europe*, or twelve months, if for a greater diſtance. *Page* 86

Miſtake.

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Contributes to general average. 177

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Name.

THE name of the inſured muſt be inſerted in the policy; or the name of the agent affecting it, *as agent*. 18, 19, 20
It is now ſufficient to inſert the name of the perſon actually intereſted, or that of the conſignor or conſignee of the goods, or the names of thoſe who receive the orders to inſure, or who ſhall give the orders to effect the inſurance. 19, 20
The name of the ſhip and maſter muſt be inſerted in the policy. 20
But the inſurance is not vitiated if the name of the ſhip be miſtaken. 21
The ſhip may be changed in the voyage if neceſſity require it. 23

Navigation.

Inſurances which tend to a breach of the navigation acts are void. 335 to 339

Negligence.

Action lies againſt an agent who neglects to inſure. See titles *Action* and *Agent*. 404

Neu-

Neutrality.

A neutral ſhip is not obliged to ſtop to be ſearched; the ſearcher does it at his peril, it is a caſe of improper detention, for the coſts of which the inſurer is liable. *Page* 104, 498
This point is now decided otherwiſe, and a ſhip muſt ſtop to be ſearched 500, 501
It is not a breach of neutrality for a neutral ſhip to carry enemy's property from her own to the enemy's country, though ſhe be thereby liable to be detained and carried into a *Britiſh* port for the purpoſe of ſearch. 328
If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. 460
In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral, it was expreſsly found by the jury that they were not neutral. The court, therefore, though the loſs happened by ſtorm, and not by capture, declared that the contract was void. *ibid*
If the ſhip and property are neutral when the riſk commences, this is a ſufficient compliance with a warranty of neutrality. 460, 462
The inſurer takes upon himſelf the riſk of war and peace. 461
If the property be neutral at the time of ſailing, and a war break out the next day, the inſurer is liable. 462
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Of abandonment when to be given. 239

Oleron (Laws of).

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They do not treat of inſurances. Introd. xxviii

Open Policy.

In an *open* policy, the value of the property is not mentioned; but muſt be proved at trial. *Page* 1, 137

Opinion, ſee *Evidence.*

Owner.

A ſhip's huſband has no right to inſure for the reſt of the owners, without their direction. 20

Partial Loſſes.

AVERAGE loſs, in policies of inſurance, means a particular partial loſs. 133
It is leſs ambiguous to call it a *partial* than an average loſs. *ibid.*
Partial loſs, when applied to the ſhip, means a damage, which ſhe may have ſuſtained in the courſe of the voyage, from ſome of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have ſuffered from ſtorm, &c. though the whole or the greater part thereof may arrive in port. 135
Theſe loſſes fall upon the underwriter, if they amount to 3*l. per cent.* 135, 149
But if a loſs, ariſing from *a general average*, ſhould be under 3*l. per cent.* ſtill the underwriter is liable. 135
Suppoſe 101 cheſts of goods be ſhipped, and three of them be wholly ſpoiled: Q. Will the underwriter be liable? 136
How average ſettled where ſeveral articles are inſured for one ſum, with a diſtinct valuation on each, and the policy does not attach upon all. *ibid.*
In caſe of a partial loſs, the value of the policy can be no guide to aſcertain the damage, but it becomes the ſubject of proof as in caſe of an open policy. 137
When goods are partially damaged the underwriter muſt pay the owner ſuch pro-

proportion of the prime coſt or value in the policy, as correſponds with the proportion or diminution in value occaſioned by the damage. *Page* 137
The proportion is aſcertained in this way; where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix whether it be a third or fourth worſe, then the damage is aſcertained. 138, 142
This can only be done at the port of delivery where the whole damage is known and the voyage is completed. 138
Whether the price of the commodity be high or low, it equally aſcertains the proportion of damage. This proportion the underwriter muſt pay, not of the value for which it ſold, or the market price of the commodity; but of the value ſtated in the policy. *ibid.*
When it is an open policy, the invoice of the original coſt, with the addition of all charges, and the premium of inſurance, ſhall be the ground of the computation. *ibid.*
But whether the goods arrive at a good or bad market, it is immaterial to the inſurer. *ibid.*
The true way of eſtimating the loſs is to take the value of the commodity at the fair invoice price. *ibid.*
Theſe rules can only apply to caſes where there is a ſpecific deſcription of goods. 146
Where the property is of various kinds, an account muſt be taken of the value of the whole, and a proportion of that as the amount of the goods loſt. *ibid.*
In adjuſting a partial loſs on goods ariſing from ſea damage, the calculation is to be made on the difference between the reſpective *groſs proceeds* of the ſame goods when ſound and when damaged, and not on the *net proceeds*. *ibid.*
In caſe of total loſs the valuation in the policy is adhered to, unleſs there be ſome proof of fraud. 147, 148
This rule abided by in inſurance on ſhip where value greatly diminiſhed at time of loſs, by conſumption of ſtores, &c. *Page* 148 *n*
Q. Whether goods partially damaged may be opened, except in the preſence of the inſurers or their agents. 148
No loſs ſhall be deemed total ſo as to charge the inſurers within the meaning of that part of the memorandum which exempts them from partial loſſes happening to corn, fiſh, ſalt, fruit, flour, and ſeed, ſo long as the commodity ſpecifically remains, though perhaps wholly unfit for uſe. 149
This was held with reſpect to a cargo of wheat, which was partially damaged in a ſtorm. *ibid.*
The ſame with reſpect to a cargo of fiſh, which was ſtinking, and of no value when examined. 151
But when a cargo of fruit was ſo much putrified from ſea damage that it was obliged to be thrown overboard, the underwriters held liable. 153
A cargo of *peas* was ſo much damaged, that the produce was three-fourths leſs than the *freight*: but as it in fact arrived at the port of deſtination, the underwriter was held not to be liable. 160
In policies upon lives, there cannot, from the nature of the event, be a partial loſs. 579
But there may in inſurances againſt fire. 595

Of adjuſting a partial Loſs. See *Adjuſtment.*

Partnerſhip.

No ſociety or partnerſhip can underwrite, except the Royal Exchange and the London Aſſurance Companies. 7
What ſhall be a partnerſhip within the ſtatute 6 *Geo.* 1. ch. 18. 8, 9, 10

Payment of Money into Court.

The underwriters were empowered by ſtatute to pay money into court upon any diſpute; and then the inſured proceed at their peril. 544

People.

People.

People, in the clause of a policy respecting detention, means the governing power of the country. *Page* 103

Perils of the Sea.

Every accident, happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea. 82

For such losses the underwriter is answerable. *ibid.*

A ship driven by the wind on an enemy's coast, and there captured, having sustained no damage from the wind, shall be said to be lost by capture. *ibid*

Two of the men employed in mooring a ship in a harbour were impressed, whereby she went ashore and was lost. This held a loss by *perils of the sea* 82. *n*

The mistake of the captain not *a peril of the sea.* 83

A loss of slaves by death from failure of provisions, occasioned by delay from stormy weather, is not a loss by perils of the sea. 84

Destruction of a ship by worms infesting the rivers of *Africa*, is not a peril of the sea. 85

A ship which is never heard of, after her departure, shall be presumed to have perished at sea. *ibid*

This was held in an action on a policy upon the ship from *North Carolina* to *London*; and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of. 85

The same was held in a case, where a ship had been captured and ransomed at sea, but was never afterwards heard of, and never arrived at her port of destination. *ibid.*

In *England* no time is fixed, within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. 86

A practice, however, prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any part of *Europe*, or within twelve, if for a greater distance. *Page* 86

Petty Average

Consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c. 133

These never fall upon the underwriter. 184

Another sense, in which this word is understood, is when we speak of a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention. *ibid.*

This is a charge which never falls upon the underwriter. *ibid.*

Pilot. Vide *Sea-worthiness.*

Pirates.

The underwriter, by express words in the policy, undertakes to indemnify against the attacks of pirates. 83

Plea. See *Declaration.*

Policy.

A policy is the instrument by which the insurance is effected. 1

Policies are of two kinds; *valued* and *open* policies: the difference between them. *ibid.*

They are only simple contracts; but of great credit. *ibid.*

Cannot be altered when once they are signed. *ibid.*

Unless there be some written document to shew that the meaning of the parties was mistaken: or unless they be altered by *consent.* 2, 3

A policy is a species of property for which trover will lie at the instance of the insured, if it be *wrongfully* withheld from him. 4

The written clauſes in a policy will controul the printed words. *P.* 4, 5
The form of the policy now uſed is two hundred years old. 17
Very irregular and confuſed, and often ambiguous. *ibid.*
There are nine requiſites of a policy. 17, 18
The name of the perſon inſured. 18
This is regulated by ſtat. 25 *Geo.* 3. c. 44. and 28 *Geo.* 3. c. 56. 18, 19, 20
Upon the former act it has been held, that if an agent effects a policy for the principal reſiding abroad, his name muſt be inſerted in the policy *as agent.* 19
Q. When the principal reſides abroad, muſt not the agent live in *England?* *ibid.*
The names of the ſhip and maſter; unleſs the inſurance be general, "*on* "*any ſhip or ſhips.*" 20
Whether the inſurance be made on ſhips, goods or merchandizes. 23
As to the memorandum at the foot of the policy, ſee *Memorandum.*
A policy *on goods* generally does not include goods laſhed on deck, the captain's cloaths, or the ſhip's proviſions. 25
A policy muſt contain the name of the place at which the goods are laden, and to which they are bound. 26
A policy from *L.* to —— is void. *ibid.*
When the riſk commences, and when it ends. On the goods it uſually begins from the loading, and continues till they are ſafely landed: on the ſhip, from her beginning to load at *A.* and continues till ſhe arrive at the port of deſtination, and be there moored 24 hours. 27
The various perils againſt which the underwriter inſures. 30
Q. Whether the underwriter is liable for thefts committed by the people on board; and for loſs ariſing from bad ſtowage, &c. 31
The policy is frequently made with the words, *loſt or not loſt*, in it: which add greatly to the riſk. 32
The policy muſt contain the premium or conſideration for the riſk. 33
The day, month, and year, on which the policy was executed, muſt be inſerted. *Page* 35
The policy muſt be duly ſtamped. *ibid.*
Unſtamped *ſlip* not binding on underwriter, nor receiveable in evidence. 37, *note*
In what caſes policy may be altered. 38, 39

Vide *Stamp.*

As to the Conſtruction of the Policy, ſee *Conſtruction.*

Of Policies on Eaſt India Voyages, ſee title *Eaſt India Voyages.*

Of Policies upon gaming or wagering Contracts, ſee title *Wager Policies.*

Practice.

Account of the modern improvements in the practice and proceedings upon policies of inſurance. Introd. xliii.

Premium.

The premium is the foundation of the promiſe or *aſſumpſit.* 33
It is in the policy acknowledged by the inſurer to be received at the time of underwriting. *ibid.*
Q. Whether after this the inſurer could maintain an action againſt the *inſured himſelf* for the premiums. *ibid.*
In practice, the inſured generally act by a broker, and by the cuſtom, an action may be maintained againſt him, notwithſtanding the acknowledgement in the policy. *ibid.*
The broker may alſo maintain an action againſt the aſſured for premiums paid on his account. 34
And the underwriter may maintain an action directly againſt the broker for premiums. 35
The receipt for the premium contained in the policy, is concluſive evidence as between the aſſured and the underwriter. 608, 609

See *Fraud.*

When the Premium ſhall be returned, ſee title *Return of Premium.*

Profits.—See *Intereſt* (*Inſurable*).

Prohibited Goods.

All inſurances upon commodities, the importation or exportation of which is prohibited by law, are void. *Page* 329

This rule prevails, whether the inſurer did or did not know that the ſubject of the inſurance was a prohibited commodity. *ibid.*

The parliament of *England* has paſſed a law, inflicting a penalty of 500*l.* on the inſurer, who ſhould, by way of inſurance, procure the importation of prohibited goods; and a like penalty on the inſured. 330

By a ſubſequent law, the importation of any foreign alamodes or luſtrings, by way of inſurance or otherwiſe, without paying the duties, is expreſsly prohibited. 331

Whoever, by way of inſurance, undertakes to export wool from *England* to parts beyond the ſeas, ſhall be liable to pay 500*l.* 332

The like penalty is inflicted on the inſured. 333

Beſides which all inſurances on woollen goods are declared void. *ibid.*

Perſons making ſuch inſurances on wool, &c. are liable for the firſt offence to a fine of 50*l.* and ſix months' ſolitary impriſonment. The ſame penalty on the inſured; and the inſurance is void. *ibid.*

Inſurances made to protect ſmuggled goods are void. 335

Inſurances, which tend to a breach of the navigation acts, are void. 335 to 339

It is a contravention of theſe acts for a *Swediſh* ſhip to take in goods at *Madras* for *Gottenburgh.* 337 *note*

Colonial produce cannot be legally ſhipped from the *Britiſh Weſt Indies* for *Gibraltar.* *Page* 337 *note*

Inſurances on goods prohibited by royal proclamation in time of war are void. 340

Goods which from their nature are contraband, enumerated. 340, 341

Inſurances upon goods, the exportation or importation of which are prohibited only by the revenue laws of other countries, are valid in *England.* 341

The opinions of foreign writers upon this queſtion, conſidered. 341, 342

Proof. See *Evidence.*

Proteſt.

Proteſt ſhewn by plaintiff to defendant not evidence for the defendant. 547, 548

Proviſions of a Ship

Are not included under a general inſurance on *goods.* 25

But proviſions ſent out in a ſhip for the uſe of the crew are protected by a policy on the ſhip and *furniture.* 74

Proviſions expended during a detention to repair, or detention by an embargo, cannot be recovered againſt the inſurer on the *ſhip or goods.* 70, 72

Whether they fall into a general average? 174

Ship's proviſions do not contribute to a general average. 176

Ranſoms

Are prohibited by ſtatute; and money paid for ranſoming a ſhip cannot be recovered from the underwriters. 91, 219

Re-aſſurance.

RE-ASSURANCE is a contract which the firſt underwriter enters into, in order to relieve himſelf from

those risks which he has previously undertaken by throwing them upon other underwriters, who are called Re-assurers. *Page* 369
This species of contract is countenanced in most parts of *Europe*. *ibid.*
The opinions of foreign writers upon re-assurance stated. *ibid.*
They were admitted in *England* till the 19 *Geo.* 2. *c.* 37. *s.* 4. which declares it to be unlawful to make re-assurance, unless the assurer should be insolvent, become a bankrupt, or die: in either of which cases, such assurer, executors, administrators, or assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. 370
The reasons for these exceptions as to bankrupts and deceased underwriters, stated. 371
Re-assurances on *foreign* ships are prohibited by this act, except in the three instances mentioned in the statute. 372
In *France*, and other countries, it is allowed to the insured to insure the solvency of the underwriter. 373
Not allowed in *England*. *ibid.*
Distinction between a re-assurance and a double insurance. *ibid.*
Where a policy void as a re-assurance, the premium is not recoverable. 513

Recapture. See *Capture.*

Registration.

The law of *England* does not require that a policy should be registered. 39

Rendezvous.

Sailing from place of rendezvous is a departure with convoy. 44

Representation. See title *Fraud*, and titles *Warranty.—Convoy.*

Requisites of a Policy.

The name of the person insured. 18
The name of the ship and master. *P.* 20
Whether they are ships, goods, or merchandizes, on which the insurance is made. 23
The name of the place at which the goods are laden, and to which they are bound. 26
The time when the risk commences, and when it ends. 27
The various perils to which the underwriters are exposed. 30
The consideration or premium for the hazard run. 33
The time when the policy was executed. 35
That the policy be duly stamped. *ibid.*

Respondentia. See *Bottomry.*

Return of Premium.

The question, whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. 283
The ordinances of foreign states declare, for the most part, that it shall. *ibid.*
In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *ibid.*
In two or three instances where the underwriters have been relieved in Chancery, from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. 284
The question came on to be considered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the Court of King's Bench considered this offer in the same light as if he had paid the money into court; and therefore the question remained undecided. *ibid.*
But in case where the fraud was of a very gross and heinous nature, Lord *Mansfield* told the jury, that the premium

premium ſhould not be reſtored to the inſured. *Page* 285
In all caſes of *actual* fraud on the part of the aſſured or his agent, the underwriter may retain the premium. 286
It is clear, that if the underwriter has been guilty of fraud, an action *lies* againſt him, at the ſuit of the inſured, to recover the premium. *ibid.*
In caſes of deviation the premium is not to be returned. 421
Where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus premium. 503
If goods are inſured to come in certain ſhips from abroad, but are not in fact ſhipped, the premium ſhall be returned. *ibid.*
If the ſhip be arrived before the policy is made, the inſurer being apprized of it, and the inſured being ignorant of it, he is entitled to have his premium reſtored. *ibid.*
But if both parties are ignorant of the arrival, and the policy be *loſt or not loſt*, it ſhould ſeem the underwriter ought to retain it. *ibid.*
Clauſes are frequently inſerted by the parties, that upon the happening of a certain event there ſhall be a return of premium. *ibid.*
If the ſhip or property inſured was never brought within the terms of the contract, ſo that the inſurer never ran any riſk, the premium muſt be returned. *ibid.*
A clauſe was inſerted that 8*l. per cent.* of the premium ſhould be returned, if the ſhip ſailed from any of the *Weſt India* iſlands with convoy for the voyage *and arrives*. The court held, that the arrival of the ſhip, whether with or without convoy, entitled the party to a return of the premium ſtipulated. 505
So alſo, though there has been a capture and re-capture during the voyage inſured. 507
Whether the cauſe of the riſk not being run is attributable to the *fault, will*, or *pleaſure* of the inſured, the premium is to be returned. 508, 509
When the words *and arrive* follow other conditions in a clauſe for a return of premium, theſe words annex a condition which overrides all the others. *Page* 508 *note*
When a policy is void as a wager policy, the court will not allow the inſured to recover back the premium. 510
Nor in the caſe of a re-aſſurance. 513
Where a policy was made to cover a trading with the enemy the inſurance is void, and the aſſured cannot recover the premium. 514
So where the inſurance is contrary to the navigation laws. 515
Where the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards. *ibid.*
Therefore no return in deviations. *ibid.* note (*a*)
But if there are two diſtinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, though both are contained in one policy. 516
Thus held in an inſurance "at and "from *London* to *Halifax*, warranted "to depart with convoy from *Portſ-* "*mouth*," when the ſhip arrived at *Portſmouth* the convoy was gone. The premium for the voyage from *Portſmouth* to *Halifax* was returned. 378
A ſhip was inſured for twelve months, at 9*l. per cent.* warranted free from *American* captures. The ſhip was taken within two months by the *Americans*; but there ſhall be no return of premium, becauſe the contract was entire; the premium was a groſs ſum ſtipulated and paid for twelve months. 516
So alſo it was held where a ſhip, inſured for twelve months, was taken at the end of two; though the whole premium of 18*l.* was acknowledged to be received *at the rate of* 15*s. per month*; for that is only a mode of computing the groſs ſum. 519
When the contract is entire, whether it be for a ſpecified time, or for a

voyage, there shall be no apportionment or return, if the risk has once commenced. *Page* 524, 525
Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usuage established upon such voyage; though there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable. 525
It is otherwise, if the jury find an express usage upon the subject of return of premium. 529
Indeed, it seems that there never has been an apportionment, unless there be something like an usage found to direct the judgment of the court. 530
If a person whose life is insured, should commit suicide, or be publicly executed the next day after the risk commences, there can be no return of premium. 586
There can be no return of premium in insurances against fire. 603

Rhodians.

Some account of their maritime regulations. Introd. iv
Supposed to have been unacquainted with the contract of insurance. Introd. vi
They were acquainted with the contract of bottomry. Introd. vii

Risk.

The risk on the ship in general commences from her beginning to load, and continues till she has moored twenty-four hours in safety. On goods from the loading till they are safely landed, which includes the carriage to the shore in the ship's boats, or in public lighters, but not in those of the owner of the goods. 27, 28, 29
The risks which the underwriters take upon themselves. 30
Q. Whether theft by the people on board be of the number? *Page* 30
Insurers not liable to all the usual risks on cargoes of slaves. 32

Romans.

Some account of their commerce. Introd. x
They were unacquainted with insurances. Introd. xiv
Contrary opinions stated and controverted. Introd. xv

Royal Exchange Assurance Company,

Erected by royal charter, authorised by stat. 6 *Geo.* 1. ch. 18. 7
This and the *London* Assurance Company, are the only *societies* which may make insurances. 7, 8
The privileges of the *South Sea* and *East India* Companies preserved. 10
This company rejects the words "*or the* "*ship be stranded,*" in the memorandum at the foot of the policy. 24
This society, when sued *in an action of debt*, may plead generally *that they owe nothing*, or in *covenant that they have not broke it*, and in both cases may give the special matter in evidence. 536
This company obtained his majesty's charter to enable them to make insurances on lives. 572

Sailing (Warranty of).

IF a man warrant to sail on a particular day, and do not, the insurer is discharged. 429
This rule holds, though the ship be delayed for the best and wisest reasons, or even though she be detained by force. *ibid.*
Thus, where a ship was insured "at "and from *Jamaica*," warranted to sail on or before the 26th of *July*, it appeared that the ship was ready and would have sailed on the 25th, *if she had not been restrained by the order and command of Sir Basil Keith*, governor of

of *Jamaica*, and *detained beyond the day*. The insurer was discharged. *Page* 429
This rule is adopted by foreign writers. 430
If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case. *ibid.*
Upon a warranty to sail on or before a particular day, if the ship sail before the day from her port of loading *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. 431
But if her cargo was not complete it would not be a commencement of the voyage. *ibid.*
The same doctrines prevail, even though a condition be inserted in one of the ship's clearances, *that she should pass by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government. 436
Thus also where an embargo was actually published before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet, as he swore that he believed the embargo was to be taken off, the underwriter was held liable. 440
What shall be a sailing from the port of *London*. 2. 441

Sailing Instructions.

Essential to convoy. 443 & *seq.*

Sailors.

Insurances on the wages of sailors are forbidden. 14
Slaves, or any commodity to be received in lieu of wages by a sailor, cannot be insured. 15
But the captain may insure goods which he has on board, or his share in the ship if he be part owner. *Page* 15
The wearing apparel of the sailors is excepted from the allowance of salvage. 188

Salt.

The word *Salt* used in the memorandum of a policy of insurance has been held not to include *Salt-petre*. 149

Salvage.

Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates or enemies; it is also used sometimes to signify the thing itself which is saved. But the former is the sense in which it is here used. 189
In an action of trover, it has been held that the defendants might retain the goods till payment of salvage, as well as a taylor the cloaths which he has made. *ibid.*
When a ship has been wrecked, the law of *England* by various statutes declares, that *reasonable* salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace. 181 to 187
The clause of 12 *Ann.* stat. 2. c. 18. referring the *quantum* of compensation to three justices of the peace only applies to cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them. 183, note (*a*)
But now by 48 *Geo.* 3. c. 130. it is provided, that in all cases the *quantum* of compensation shall be referred to three justices of the peace. 615
If any prize taken from the enemy shall appear to have belonged to any of his majesty's subjects, it shall be restored to the former owner, upon his paying in lieu of salvage, one-eighth of the value if retaken by one of his ma-

jesty's ships, but if retaken by a privateer, one-sixth. *Page* 94, 188
Wearing apparel of the master and sea men are always excepted from the allowance of salvage. 188
The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c. 188, 189
Underwriters by their policy, expressly undertake to bear all expences of salvage. 189
In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. *ibid.*
Thus in a declaration on a policy on goods, it stated, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwick* held that under this declaration, the plaintiffs might give in evidence the expences of salvage. *ibid.*
But if the insurer pay to the insured such expences, and from particular circumstances, the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss. 190, 212
Where the salvage is high, the other expences are great, and the object of the voyage is defeated, the insured is allowed to abandon to the insurer, and call upon him to contribute for a total loss. 191

See *Abandonment.*

There is neither average nor *salvage* upon a bottomry bond in *England.* 564
Aliter, in *France* and *Denmark.* 565

Sea, vide *Perils of the Sea.*

Sea-worthiness.

Every ship insured must, at the commencement of the insurance, be able to perform the voyage, unless some external accident should happen, and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. *Page* 288
Ship insured *at and from*, the policy is not void because the ship is under repair at the place to make her fit to go to sea. 299, *note* (*a*)
This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the voyage. 288
But the insured ought to know whether she was sea-worthy or not at the time she set out upon her voyage; yet if it can be shewn that the decay to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable if she should be lost a few days after her departure. 289
If a ship become leaky immediately after sailing, and founders without any visible cause, the jury may presume she was not sea worthy. 289, note (*a*)
The whole doctrine of sea-worthiness to be collected from the case of the *Mills* frigate, which is fully stated from page 290 to 296, and see also 297, 298
Where there is an insurance upon a ship *at and from*, it is sufficient if she be sea-worthy at the time of sailing. 299, note (*a*)
The doctrine of sea-worthiness, as established by the law of *England*, is consonant to the laws of all commercial and maritime states in *Europe.* 300
Where the ship is not sea-worthy, the policy is void, as well where the insurance is upon the goods, as when it is upon the ship itself. 306
But insufficiency in a former voyage will not vacate the contract. 300
The ship must be properly equipped, have a sufficient crew, a captain and pilot of competent skill. 301
Must be so equipped as to be rendered as secure as possible from *capture* as well as from the *perils of the sea.* 304

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See the effect of the ſentence of foreign courts conſidered. *Page* 462, 463 note (*a*)

See Admiralty.

Ship.

The name of the ſhip muſt be inſerted in the policy. 20
But if neceſſity require it, the ſhip may be changed in the courſe of the voyage, and the inſurer *on the cargo* continues liable. 23, 383
Sometimes there are inſurances on "any ſhip or ſhips." 21
Such inſurances are legal, and how applied. 22

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Inſurances on cargoes of ſlaves regulated. 32
By 47 *Geo.* 3. c. 36. the ſlave trade aboliſhed, and all inſurances reſpecting ſlaves prohibited. 32 *note*

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Every policy of inſurance muſt be duly ſtamped. 35
In what caſes alterations in policy permitted by ſtamp act. 38, 39
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28. *c.* 15. *p.* 131.

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33. *c.* 52. *p.* 309.
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35. *c.* 63. *p.* 35.
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37. *c.* 90. *p.* 602, 603.
— *c.* 97. *p.* 309.
38. *c.* 76. *p.* 456.
39. *c.* 80. *p.* 32. 85.
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43. *c.* 160. *p.* 95. 101.
47. *c.* 36. *p.* 32. *note.*
48. *c.* 130. *p.* 615.

Sufficiency. See title *Sea-worthineſs.*

Stowage.

For bad ſtowage of the cargo the inſurer is not anſwerable. 30

Stranding.

What ſhall be deemed a ſtranding within the memorandum, by which no average loſs on fruit, &c. is recoverable, unleſs the ſhip be ſtranded. *Page* 24, 150.

If the ſhip has been ſtranded, average loſſes may be recovered, though not a conſequence of the ſtranding. 157

Running on piles of an embankment in a river, and reſting there, is a ſtranding. 148, note (*b*)

Survey. See *Evidence, Admiralty.*

Thieves.

Q. WHETHER the inſurers are anſwerable for thefts committed by the people on board the ſhip? 30

They are expreſsly liable for thefts committed by external thieves. 31

Time.

No policy for time muſt be for a longer term than 12 months. 37

In inſurances upon time, the court, in their conſtruction of them, has always attended to the meaning of the parties, and a liberal expoſition of the words of the contract. 79

A policy was made on a letter of marque at and from *Liverpool* to *Antigua, with liberty to cruize ſix weeks*; the court held that this meant ſix *ſucceſſive* weeks, and not a deſultory cruiſing for ſix weeks at any time. 79, 80

Total Loſs.

A total loſs in inſurances does not always mean that the property inſured is irrecoverably loſt or gone; but that, by ſome of the perils mentioned in the policy, it is in ſuch a condition as to be of little uſe or value to the inſured, and to juſtify him in abandoning his right to the inſurer, and calling upon him to pay the whole of his inſurance. 132, 192

In a total loſs, properly ſo called, the prime coſt of the property inſured, or the value in the policy, muſt be paid by the underwriter. 132

Where the policy is a valued one, it is only neceſſary to prove that the goods were on board at the time of the loſs. *Page* 137
Where it is an open policy, the value muſt alſo be proved. *ibid.*
The inſured may call upon the underwriter for a total loſs, if the voyage be abſolutely loſt, or not worth purſuing: if the ſalvage amount to half the value; or if further expence be neceſſary, and the underwriter will not engage at all events to bear that expence. 194, 201, 202
The right to abandon muſt depend on the nature of the caſe at the time of the action brought, or at the time of the offer to abandon; and therefore if at the time advice is received of the loſs, it appear that the peril is over and the thing is in ſafety, the inſured has no right to abandon. 195, 207
Thus, in a caſe where there was a capture and recapture, and it was ſtated that, at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held that the inſured had no right to abandon. 205
But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund; but the inſurer ſhall ſtand in his place for the benefit of ſalvage. 212
Where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon. 217, 219
A veſſel inſured for ſix months is captured and ſold by the captors, and purchaſed by the captain for the original owners, this is only a partial loſs; though otherwiſe if the aſſured had abandoned, when carried into port in the enemy's poſſeſſion. 219

Trover.

Trover will lie for a policy, at the ſuit of the inſured, if it be wrongfully withheld from him. 4
In trover, a defendant may in evidence juſtify the retainer of the goods till payment of ſalvage. 180

Underwriter. See *inſurer.*

Uſage.

IN the conſtruction of policies no rule has been more frequently followed than *the uſage of trade* with reſpect to the voyage inſured. *Page* 40
As to uſage upon a warranty of convoy. 44
Upon an inſurance on goods to *Labradore*, and till they were ſafely landed, the inſurers were held liable, on account of the uſage, although the loſs did not happen till a month after the ſhip's arrival, the crew having been all that time employed in fiſhing, and never having unloaded the goods but at leiſure times. 58
Goods, while on board launches, protected by a policy from N. to C. *till diſcharged and ſafely landed*, ſuch being the uſual method of carrying on that trade. 29. *note.*
Effect of uſage in *Newfoundland* trade. 605, 606

As to the Uſage in Eaſt India Voyages, ſee title *Eaſt India Voyages.*

Valuation.

IN a total loſs, the underwriter muſt pay the amount of the prime coſt of the property inſured, or the value mentioned in the policy. 132
So if part of the cargo, capable of a diſtinct valuation, be totally loſt, the inſurer muſt pay the whole prime coſt of the part ſo loſt. *ibid.*
In caſe of a partial loſs, when the policy is valued, the rule for eſtimating the damage, is to aſcertain whether the goods be a third or fourth worſe when they arrived at the port of delivery; and then the underwriter muſt pay a third or fourth of the value in the policy, without regard to the riſe or fall of the market. 138, 142
When the valuation is not ſtated in the policy, the invoice of the coſt, with addition of all charges, and the premium of inſurance, is the foundation upon which the loſs ſhall be computed. 138

Valued Policy.

In *valued* policies, the value of the property insured is inserted at the time of making the contract, and upon a trial, it is not necessary to go into the proof of the value, because it is admitted by the policy, *Page* 1, 137

It is in such a case only necessary to prove that the property was on board. 137

Where the loss is partial, the value in the policy can be no guide to ascertain the damage; and it must become a subject of proof, as in the case of an open policy. *ibid.*

A valued policy is not a wager policy. 143, 353

In a valued policy, it is only necessary to prove some interest to take it out of the statute 19 *Geo.* 2. *c.* 37. 143

If used merely as a cover to a wager, such an evasion would not be allowed to defeat the statute. 143, 353

After a judgment by default upon a *valued* policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed in the policy. 167, 353

Venice.

Origin and progress of that republic. Introd. xx.

Void Policies.

The name of the person actually interested must be inserted in the policy, or the name of the agent effecting it, *as agent*; otherwise the policy is void. 18

When the principal resides abroad, the agent so effecting the policy must live in *England*. *Qu.* 19, 20

But now it is sufficient to insert the name of the person actually interested, or that of the consignor or consignee of the goods, or the names of those receiving the orders to insure, or who shall give directions to effect the insurance. 19, 20

Policies are rendered void *ab initio*, by the least shadow of fraud or undue concealment. 242

Cases of fraud with respect to policies, are liable to a three-fold division. 1st, The *allegatio falsi*. 2d. The *suppressio veri*; 3d, Misrepresentation. The latter, though it happen by mistake, if in a material part, will render the policy void as much as actual fraud. *Page* 243

See title *Fraud.*

Every ship insured must, at the commencement of the insurance, be able to perform the voyage, unless some external accident should happen and if she have a latent defect; wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. 283

See title *Sea-worthiness.*

Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. 307

See title *Illegal Voyages.*

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. 329

See title *Prohibited Goods.*

By statute 19 *Geo.* 2. *c.* 37. it was declared, that insurances made on ships or goods, *interest or no interest*, or *without further proof of interest than the policy, or by way of gaming, or wagering*, or without benefit of salvage to the insurer, should be null and void. 348

See title *Wager Policies.*

It is, by the same statute, declared unlawful to make re-assurance, unless the first assurer should be insolvent, become a bankrupt, or die: in either of which cases such assurer, his executors, administrators, and assigns, might make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. 370

See title *Re-assurance.*

Wager Policies.

See *Interest Insurable.*

IN wager policies, the performance of the voyage in a reasonable time and manner, and not the bare existence of

of the ſhip or cargo, is the object of the inſurance. *Page* 345
Theſe policies being contradictory to the real nature of a policy, which is a contract of indemnity, were originally bad. 346
They were introduced into *England* ſince the Revolution. *ibid.*
But the courts of juſtice looked on them with a jealous eye; and the courts of equity ſtill conſidered them as void. *ibid.*
Thus a policy was decreed to be delivered up where the inſured had no intereſt in the ſhip or cargo, except as a lender on bottomry, for which he had a bond. 346, 347
Where a man had inſured goods by agreement valued at 600*l.* *and not to be obliged to prove any intereſt*, the Chancellor ordered the defendant to diſcover what goods he had on board. 347
The great diſtinction between *intereſt* and wager policies was, that in the former, the inſured recovered for the loſs actually ſuſtained, whether it was a total or partial loſs: in the latter he could never recover but for a total loſs. 347
By the ſtatute of 19 *Geo.* 2. *c.* 37. it was enacted, that inſurances made on ſhips or goods, *intereſt or no intereſt*, or *without further proof of intereſt than the policy, or by way of gaming or wagering, or without benefit of ſalvage to the inſurer*, ſhould be null and void. 348
There is an exception for inſurances on private ſhips of war, fitted out ſolely to cruize againſt his majeſty's enemies. 349
It was alſo provided, that any merchandizes or effects from any ports or places in *Europe* or *America*, in the poſſeſſion of the crowns of *Spain* or *Portugal*, may be inſured in ſuch way or manner as if this act had not been made. *ibid.*
This ſtatute has been frequently held not to extend to inſurances of foreign property, on foreign ſhips. 350
A count in a declaration averring that the plaintiffs, as commiſſioners appointed by his majeſty, under an act of parliament, for the diſpoſal of *Dutch* ſhips and effects, made the inſurance; *and that the ſaid ſhips, or any of them, were not belonging to his majeſty, or any of his ſubjects*, was holden to be good, within the ſtatute. *Page* 352
A *valued* policy is not a wager policy; for he muſt prove ſome intereſt, although he need not prove the value of his intereſt. 353
If a valued policy were uſed merely as a cover to a wager, in order to evade the ſtatute, it would be void. *ibid.*
An inſurance on the profits expected to ariſe from a cargo of molaſſes, belonging to the plaintiffs, was held to be good; although there was a clauſe declaring, "that in caſe of loſs, the profits ſhould be valued at 1600*l.* without any other voucher than the policy. 354
Profits to ariſe on the ſale of a cargo of goods, an inſurable intereſt. 355
Commiſſion and privileges of captain in *African* trade inſurable. 356
When the obtaining of a cargo is only an expectation, the commiſſion of the conſignee is not inſurable. *ibid.*
An inſurance being made on any of the packet boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England* as his majeſty ſhould direct, for one year, upon any kind of goods and merchandizes whatſoever; it was agreed that the goods and merchandizes ſhould be valued at the ſum inſured, without further proof of intereſt than the policy. The court held that this was a policy of a mixed nature, and that the inſured might recover. 357
Upon a joint capture by the army and navy, the officers and crew of the ſhips, before condemnation, have an inſurable intereſt, by virtue of the prize act, which uſually paſſes at the commencement of a war. 358
So alſo the commiſſioners for the care and diſpoſal of *Dutch* effects have an inſurable intereſt in *Dutch* ſhips and effects ſeized at ſea for the purpoſe of bringing into the ports of this

kingdom, and a count averring that *they were intereſted as ſuch commiſſioners* was holden to be good. *Page* 360

All inſurances, made by perſons having no intereſt in the event, about which they inſure, or without reference to any property on board, are merely wagers, and are void. 363

Thus where the defendant, in conſideration of 20*l.* paid by the plaintiff, undertook that the ſhip ſhould ſave her paſſage to *China* that ſeaſon, or that he would pay 1300*l.* within one month after the arrival of the ſaid ſhip in the river *Thames*; the contract was held to be void, although the plaintiff had ſome goods on board. *ibid.*

The plaintiffs had lent 26,000*l.* on bond, to a captain of an Eaſt-India-man, and inſured the ſhip and cargo to that amount, and *in caſe of loſs no other proof of intereſt to be required than the exhibition of the ſaid bond.* The contract was held to be void. 365

The third ſection of the ſtatute relative to inſurances, from any ports or places in *Europe* or *America*, in the poſſeſſion of *Spain* or *Portugal*, is founded on the regulations of thoſe courts; but it is looſely worded. 367

Wages.

No maſter or owner of any merchant ſhip ſhall pay to any ſeamen beyond the ſeas, any money on account of wages, exceeding a half of the wages due at the time of ſuch payment, till the ſhip ſhall return to *Great Britain* or *Ireland*. 14

Inſurances on the *wages* of ſeamen are forbidden. 15

Slaves, or any commodity to be received by a ſailor in lieu of wages, cannot be inſured. *ibid*

But the captain may inſure goods, which he has on board, or his ſhare in the ſhip, if he be a part owner. *ibid*

Extraordinary wages paid to ſeamen during a detention to repair, or a detention by an embargo, cannot be recovered againſt the inſurers *on the ſhip or cargo.* *Page* 69, 71

Q. Whether they are expences that will fall under the denomination of a general average? 174, 175

Sailors' wages are not liable to contribution in a caſe of general average. 176

Warranties implied. See title *Seaworthineſs.*

Warranty.

A warranty in a policy of inſurance, is a condition or a contingency, that a certain thing ſhall be done, or happen; and unleſs that is performed, there is no valid contract. 422

It is immaterial for what end the warranty is inſerted in the contract; but being inſerted it becomes a binding condition upon the inſured, and he muſt ſhew a *literal* compliance with it. *ibid.*

It is no matter whether the loſs happen in conſequence of the breach of warranty or not; for the very meaning of inſerting a warranty is to preclude all enquiry about its materiality. 422, 423

But as warranties are *ſtrictly* conſtrued in order to diſcharge the underwriter, ſo alſo they ſhall be ſtrictly conſtrued in favour of the inſured. 423

It is alſo immaterial to what cauſe the non-compliance is to be attributed; for although it might be owing to wiſe and prudential reaſons, the policy is avoided. 424

In this ſtrict and literal compliance with the terms of a warranty conſiſts the difference between a warranty and repreſentation. See title *Fraud. ibid.*

In order to make *written* inſtructions binding as a warranty, they muſt appear on the face of, and make a part of the policy. *ibid.*

If a policy refer to printed propoſals, they are to be conſidered as part of the policy. 425 note (*a*) 449 note (*a*)

Even though a written paper be *wrapt up in the policy*, and ſhewn to the underwriters at the time of ſubſcribing; or

or even *though it be wafered to the policy*, it is not a warranty but a repreſentation. *Page* 425
Thus when evidence was offered to prove that a paper encloſed was always deemed a part of the policy, Lord *Mansfield* refuſed to hear it. *ibid.*
A warranty written *in the margin* of the policy is conſidered to be equally binding, and liable to the ſame ſtrict conſtruction, as if written on the body of the policy. 425, 426
Words written tranverſely on the policy were held to be a warranty. 426
If a man warrant to ſail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer anſwerable. 429
This rule holds though the ſhip be delayed, for the beſt and wiſeſt reaſons, or even though ſhe be detained by legal force. *ibid.*
This rule is adopted by foreign writers. 430
If the warranty be to ſail *after* a ſpecific day, and the ſhip ſail before, the policy is equally avoided as in the former caſe. 430
Upon a warranty to ſail on or before a particular day, if the ſhip ſail before the day from her port of loading, *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo, beyond the day. 430
But if her cargo was not complete, it would not be a commencement of the voyage. 431
When a ſhip leaves her port of loading, having a full and complete cargo on board, and having no other view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port. 435
The ſame doctrine was advanced, even though it was a condition inſerted in one of the ſhip's clearances, that *ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. *Page* 436
Thus alſo an embargo was actually publiſhed, before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo, yet as he ſwore, that he believed the embargo would be immediately taken off, the underwriter was held liable. 440
If the inſured warrant that the veſſel ſhall depart with convoy and it do not; the policy is defeated and the underwriter is not reſponſible. 442
A convoy means a naval force, under the command of that perſon whom government may happen to appoint. 442, 444
Regulated by government and uſage. 455

See title *Convoy*.

Therefore where a ſhip put herſelf under the direction of a man of war till ſhe ſhould join the convoy, which had left the uſual place of rendezvous before ſhe arrived there; it was held not to be a departure with convoy, although ſhe, in fact, joined, and was loſt in a ſtorm. 443
Aliter, if ſuch ſhip was part of the convoy. 445
Q. Whether ſailing orders from the commander in chief to the particular ſhips are neceſſary to conſtitute a convoy? 446, 447
A convoy appointed by the Admiral, commanding in chief upon a ſtation abroad, is a convoy appointed by government. 448
A ſailing with convoy from the uſual place of rendezvous, as *Spithead* or the *Downs* for the port of *London*, is a *departure* with convoy, within the meaning of ſuch a warranty. 44, 448
Although the words uſed generally are "to depart with convoy," or, "to ſail with convoy," yet it extends to ſail with convoy throughout the voyage. 449
But an unforeſeen ſeparation from convoy is an accident to which the underwriter is liable. 452
So held where a ſhip was ſeparated from her

her convoy by ſtorm, prevented from rejoining it, and was loſt. *Page* 452
Even where the ſhip has, by tempeſtuous weather, been prevented from joining the convoy, at leaſt ſo as to receive the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy. 453
Otherwiſe, if the not joining be owing to the negligence and delay of the captain. 454
As where repeated ſignals for ſailing had been made the night before, and continued next day from 7 till 12; notwithſtanding which the ſhip inſured did not ſail till two hours after. *ibid.*
If a man warrant the property to be neutral, and it is not, the policy is void *ab initio.* 459
In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral; it was expreſsly found by the jury that they were not neutral. The court therefore, though the loſs happened by ſtorms, and not by capture, declared that the contract was void. 460
The ſhip of an *American* by birth reſiding in *England* is not to be conſidered *American property* within the meaning of a warranty to that effect. *ibid.*
If the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutrality. 460, 562
The inſurer takes upon himſelf the riſk of war and peace, *Page* 461
If the property be neutral at the time of ſailing, and a war break out the next day, the inſurer is liable. 462
How far what is ſaid by the broker when the names of the underwriters are put upon a ſlip, binds the aſſured. 473, 616
As to the effect of the ſentence of a foreign court of Admiralty, upon the queſtion of neutrality, ſee *Admiralty.*
Of warranty in a life inſurance, ſee title *Lives.*

Wearing Apparel

Do not contribute to a general average. 176

Wiſbuy, Laws of,

An account of them. Introd. xxviii,
They mention inſurances. Introd. xxix.

Witneſſes. See *Evidence.*

Wool. See *Prohibited Goods.*

Wreck.

In caſes of wreck a *reaſonable* ſalvage ſhall be allowed to thoſe who ſave the ſhip, or any of the goods, to be aſcertained by three juſtices of the peace. 181 to 187. 615
Of felony in caſes of wreck, vide title *Felony.*

Written Clauſe.

The *written clauſe* in a policy will controul the printed words. 4, 5

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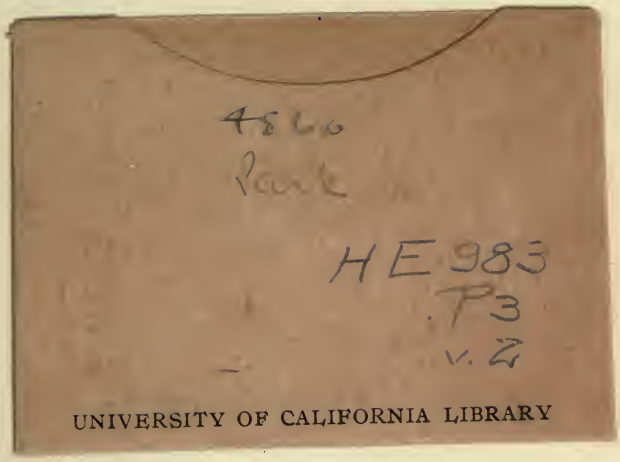
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